

TRANSCRIPT OF RECORD

Circuit Court of the United States

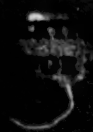
NOTICE TO TAKE DEED 190

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BERNARD M. ALIA WOODS, PETITIONER,

DEPARTMENT AND NATURALIZATION SERVICE

IN RE: THE ESTATE OF THE LATE WILLIAM WOODS, DECEASED



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 825

ELIZABETH ROSALIA WOODBY, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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[fol. 1]

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

**RECORD BEFORE INVESTIGATOR OF SWORN STATEMENT OF
ANTHONY AMICON—November 15, 1961**

Office: Cincinnati, Ohio

File No.: A10 331 472

Statement by: Anthony Amicon

In the case of: Elisabeth Rosalia Woodby

At: Cincinnati, Ohio—Room 704

Date: November 15, 1961

Before: Larry J. Porter, Investigator
(Name and Title)

In the English language. Interpreter None used.

Reporting Stenographer: Alice C. Ballinger

I am an Officer of the United States Immigration and Naturalization Service, and desire to question you under oath regarding your knowledge of Elisabeth Rosalia Woodby, to determine her status under the Immigration and Nationality laws.

Any statement you make must be made voluntarily and of your own free will. Such statement may be used against you by the government as evidence in any criminal or civil proceedings, or against Mrs. Woodby in like case. Do you understand?

A. Yes.

Q. Are you willing to make such a statement under oath?

A. Yes.

Q. Do you swear that all the statements you are about to make will be the truth, the whole truth and nothing but the truth, so help you God?

A. I do.

Q. What is your true and correct name?

A. Anthony Amicon.

Q. What is your address?

A. 323 Fountain Ave., Dayton, Ohio.

Q. Of what country are you a citizen?

A. United States of America.

Q. Where were you born?

A. Dayton, Ohio

[fol. 2] Q. What is the date of your birth?

A. December 5, 1920.

Q. How long have you known Mrs. Elisabeth Woodby?

A. Approximately three and one-half years.

Q. Are you presently married?

A. In the eyes of the court, I guess I am, although I am separated for three and one-half years or better.

Q. Do you have an action pending in court at this time?

A. The divorce action is scheduled for December 8, 1961.

Q. Did you meet Mrs. Woodby soon after your separation from your wife?

A. Yes.

Q. Where did you meet Mrs. Woodby?

A. At the place she works, Neil's.

Q. Are you referring to Neil's Restaurant on Riverview Drive, Dayton, Ohio?

A. Yes.

Q. At the time you met Mrs. Woodby was she employed as a waitress at Neil's Restaurant?

A. Yes.

Q. Would you please explain the manner in which you met Mrs. Woodby?

A. I went in with a friend of mine to eat and this friend knew Mrs. Woodby and told me about her. We ate and he introduced me and that was it.

Q. What did this friend tell you about Mrs. Woodby before your introduction to her?

A. That she was in the business.

Q. What do you mean in the business?

A. That you could pay for companionship or sexual intercourse or what have you.

Q. In other words, she was supposedly a prostitute at the time he introduced her to you?

A. That is what he claims.

Q. What is the name of the friend who introduced you?

A. Richard Boland.

Q. What is the present address of Mr. Boland?

A. He moved to Toledo. I don't know where he lives.

[fol. 3] Q. What was Mr. Boland's business activity at the time you met Mrs. Woodby?

A. He was in the new tire and recapping business.

Q. Do you believe he is still employed in the same type of tire business?

A. It is hard to say because I lost track of him. He was just a mutual friend.

Q. Did Mr. Boland indicate to you that he had had sexual relations with Mrs. Woodby at the time he discussed her with you?

A. Yes.

Q. Did he tell you what her price was for an evening entertainment?

A. No.

Q. When did you start going with Mrs. Woodby?

A. To pin it down, after I first met her, I think I started going with her, and after she got out of work I met her and we went to her apartment and had a few drinks and few beers.

Q. Where did she live at that time?

A. 1500 Riverview (West), above Neil's.

Q. When you first started going with Mrs. Woodby did you pay her for acts of prostitution?

A. The first time I went up there, when it actually came down to the thing I couldn't go through with it. When I left I left the money anyway.

Q. Did she tell you what the charges were for that evening entertainment?

A. No.

Q. During this discussion there was the problem of her needing money?

A. Yes.

Q. Why did she want the money?

A. She wanted to go and pick up her daughter and she didn't have a car and it would take \$100 to rent a car from Hertz.

Q. How much did you give her on that occasion?

A. The very first time was \$10.00; then I started sending her fruit, vegetables and things like that. I talked to her also about what Dick had told me about being in that business. In other words, I paid her for her time to talk. This went on for approximately three months with no sexual intercourse.

Q. Would you be able to furnish the approximate date you first went to Mrs. Woodby's apartment?

A. The first of December 1957 and then I went back with my wife for Christmas.

[fol. 4] Q. When did you resume a sex relationship with Mrs. Woodby after you met her in December 1957?

A. About February 1958. I didn't pay for it at that time, and then sex turned into love.

Q. Did you ever have any other person tell you that Mrs. Woodby had been practicing prostitution other than Mr. Boland?

A. No, not that I can recall, although there was not her name mentioned, but "the German girl" by several other people.

Q. Do you know any other men who paid her for acts of prostitution?

A. No sir.

Q. Your testimony has indicated that about February of 1958 you started going with Mrs. Woodby and that your relationship developed into love. Is that correct?

A. Yes.

Q. Since that time have you paid her for acts of prostitution?

A. No sir. She has helped me financially and I have helped her financially since that time.

Q. The Dayton police record at Dayton, Ohio reflects that you and Mrs. Woodby were arrested on two occasions?

A. Yes.

Q. Do you recall approximately the date you were first arrested by the Police Department?

A. No.

Q. Our records reflect that you were arrested about February 27, 1959 at 1500 W. Riverview, Dayton, Ohio. What disposition was made in that case?

A. I don't know. Mr. Moore said it was dropped and that is all I was interested in. I didn't have to appear.

Q. At that time did you make a statement to the police officers who arrested you that Mrs. Woodby was being paid by you for her acts of prostitution?

A. Yes.

Q. Was that true?

A. I would say no.

Q. What were you paying her for?

A. I just wanted to help her out, that is all.

Q. What kind of a statement did you sign at the time of your arrest by the Police officers of the Dayton Police Department?

A. It was a statement, I believe, acknowledging that I had paid her for prostitution.

[fol. 5] Q. Why did you make this statement if it wasn't true?

A. Because the officer told me, as I told you, it was the first time I had ever seen a child in tears and the officer said "We know that Mrs. Woodby is a prostitute. If you don't sign it we will take the child down to Shawn Acres if you don't tell me." This child was at that time visiting her mother and she didn't know anybody, and having children of my own that is what I did.

Q. Why did Mrs. Woodby tell you that she had been practicing prostitution?

A. She told me how she happened to get into prostitution was because her husband had left her and taken the children to Kentucky to his parents. They were living on Notre Dame Ave., Dayton, Ohio. They had had an argument and she had a friend in Pennsylvania and Mrs. Woodby had \$10.00, and she took a bus to go to Pennsylvania to see this friend of hers. No more than she got there the friend advised her to go back, which she did do, and when she got there she found the empty house, no children, no husband and no furniture. She was left without money, without nothing, and there was a woman who owned the house, and from what Mrs. Woodby said this woman was in the business of a house for prostitutes, and that is what happened.

Q. Do you know how long Mrs. Woodby practiced prostitution prior to your meeting her about November 1957?

A. No sir, I can't tell you that because I don't know.

Q. Since your acquaintance with Mrs. Woodby in 1957, to your knowledge has she practised prostitution?

A. Not only to my knowledge, sir; I would be willing to bet anything on that. I know she hasn't.

Q. What relationship exists between you and Mrs. Woodby at this time?

A. Pleasant memories—still good friends and still think of each other and do for each other what we can.

Q. Are you still dating Mrs. Woodby?

A. I see her on occasion—like yesterday afternoon she called and I went over. There was another occasion she had \$40.00 taken from her apartment and I went over to see what was what. I stop over for meals occasionally.

Q. Do you still have sex relations with Mrs. Woodby?

A. No.

Q. When did this cease?

A. Five or six weeks ago, I guess.

[fol. 6] Q. Do you believe that if you had not furnished Mrs. Woodby with money or gifts that she would have continued her relationship with you from about November of 1957 until about six weeks ago?

A. Yes, she would. As I told you, she has helped me with my rent, etc. Sometimes I am caught short and she will help me with my dinner and rent.

Q. The records of the Police Department reflect that you were arrested at a later date, about 1960. What was the result of this arrest?

A. Insufficient evidence and it was dropped. No case, I guess is what they said, although the officers came out to the place.

Q. Has Mrs. Woodby been employed as a waitress at Neil's Restaurant at 1500 W. Riverview Ave., Dayton, Ohio since you became acquainted with her?

A. Yes, she has always worked there.

Q. Do you know where Mrs. Woodby resides at this time?

A. 904 Old Orchard, Dayton, Ohio.

Q. The records reflect that Mrs. Woodby, after her husband left her destitute, started practicing prostitution while she was residing with a woman on Notre Dame Ave., Dayton, Ohio. Do you know why she continued practicing prostitution until she started her relationship with you?

A. You would have to ask her. I don't believe she was in it continuously.

Q. You have stated off the record that Mrs. Woodby has told you that she practiced prostitution in order to raise money for an operation on one of her children. Will you explain this for the record?

A. She said that her husband came to her while she was working at Neil's and said that the little boy needed an operation to the amount of \$300.00. She didn't have the money so it was in that manner, I guess, that she raised it, —through this vacuum cleaner sweeper salesman who came up for a demonstration, and she had at that time just gotten the news of the boy needing the operation. I imagine what happened was that in the conversation that she told her troubles to this vacuum sweeper salesman and I just assume that he had relations with her and told her "I can do you a lot of good and I can see that you get the money."

Q. Did she tell you the name of this man?

A. Tom, but I can not tell you his last name.

Q. Did he bring men to her apartment?

A. Whether he actually brought them or called, I couldn't say.

[fol. 7] Q. How many trips have you made to Florida with Mrs. Woodby?

A. One.

Q. Did you and Mrs. Woodby register at motels as man and wife?

A. Yes.

Q. When was this?

A. In February 1960.

Q. To your knowledge, other than the times you paid Mrs. Woodby when you first met her for her acts of prostitution, do you know of any other persons with whom she engaged in such acts?

A. No sir.

Q. Can you of your own knowledge testify that she was a prostitute other than those times when you paid her for such acts?

A. No sir, just what I have heard.

Q. Have all the statements you have made here today been true and correct to the best of your belief?

A. Yes.

CLOSED

I certify that the foregoing record of statement, pages 1 through 7, is a true and correct transcript of the testimony recorded by me at the time the statement was made.

Alice C. Ballinger, Reporting Stenographer.

[fol. 9]

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Cincinnati, Ohio

RECORD OF SWORN STATEMENT BEFORE INVESTIGATOR AND
SUPERVISING INVESTIGATOR OF ELIZABETH ROSALIA
WOODBY—November 20, 1961

In re: Woodby, Elisabeth Rosalia File No. A10 331 472

Present

Respondent: Elisabeth Rosalia Woodby

Investigator: Larry J. Porter

Supervisory Investigator: E. A. Kaler

Attorney: Earl H. Moore, Dayton, Ohio

Reporting Stenographer: Alice C. Ballinger

Place: Room 704, Post Office Bldg., Cincinnati, Ohio

Language: English

Date: November 20, 1961.

Investigator Porter to respondent:

Q. I am an officer of the United States Immigration and Naturalization Service and desire to question you under oath regarding your status under the Immigration and Nationality laws. You made a previous statement under date of July 6, 1961, which you signed on August 22, 1961, and at this time I wish to question you further relative to a matter pending before this Service. Any statement you make must be voluntary and must be given of your own free will. Such a statement may be used against you by the Government as evidence in any criminal or civil proceeding. Do you understand?

A. Yes sir.

Q. Are you willing to make such a statement under oath?

A. Yes sir.

Q. Will you please stand and raise your right hand to be sworn? (Complies) Do you solemnly swear that all of the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. What is your true and correct name?

A. Elisabeth Rosalia Woodby.

Q. What is your present address?

A. 940 Old Orchard, Dayton, Ohio.

[fol. 10] Q. Are you the same Mrs. Woodby who made a sworn statement on July 6, 1961 before Investigator Larry J. Porter at this office?

A. Yes.

Q. Do you know when your husband died?

A. The 14th of July, about three years ago.

Q. Would that be about 1958?

A. I think so.

Q. The record reflects that you were admitted to the United States as an immigrant on Feb. 7, 1956 at New York, N. Y. Is that correct?

A. Yes.

Q. Have you been absent from the United States since your admission on that date?

A. No.

Q. When were you married to John Henry Woodby?

A. Jan. 8, 1955.

Q. Had you ever been arrested for any violation of law prior to your marriage to Mr. Woodby?

A. No.

Q. Do you have any children that were born in Germany prior to your marriage to Mr. Woodby?

A. Yes.

Q. What is its name?

A. Gloria Elizabeth Woodby, born the 7th of April, 1955.

Q. Who was the father of this child?

A. John Henry Woodby.

Q. Where does this child live?

A. In Kentucky right now by my in-laws—Harlan, Ky. I can send the mail to Pennington, Va., but they do live outside of Harlan, Ky.

Q. Do you have any other children?

A. Leonard Clarence Woodby.

Q. Your previous statement reflects that your husband left you about three and one-half years ago. Do you recall the exact date he left you in Dayton?

A. About one and one-half months after the baby was born.

Q. Would you say he left about October 1957?

A. Yes.

[fol. 11] Q. Where were you living at the time your husband left?

A. 528 Notre Dame.

Q. Did you have an apartment at this address?

A. Yes.

Q. Do you recall the name of the landlady who owned this place?

A. No, I can not remember.

Q. Did she live in this house?

A. Next door. It was a double house.

Q. How large a house?

A. It was an upstairs apartment and you had to go through the kitchen down stairs.

Q. What was the name of this lady who owned the house?

A. I can't remember.

Q. Did you work for this lady?

A. No.

Q. Did this lady have several girls living in her home who practiced prostitution?

A. Not as I know.

Q. Did she have several girls living in her home?

A. I saw many people but I don't know if they were living there.

Q. Were there many men callers at this address?

A. I would say so, yes.

Q. Did she have you visit in her home frequently in order that you might entertain men visiting in her home?

A. No sir.

Q. Did you entertain men visiting her while you were residing at this address?

A. No sir.

Q. When did you move from this Notre Dame address to your next place of residence?

A. About a month later.

Q. Where did you move to?

A. Proctor Street.

[fol. 12] Q. Do you recall the address you resided on Proctor Street?

A. No. I was just staying there a month and then I moved.

Q. What kind of residence was this?

A. A big apartment house.

Q. Did you have an apartment or a room at this place?

A. Apartment.

Q. Did you live with anyone at this address?

A. With my little girl.

Q. I believe the record reflects that your husband took the children and went back—

A. Yes, but I went after her.

Q. Where did you move after you moved from Proctor Street?

A. Summit Court.

Q. Did you have an apartment at this place?

A. Yes, they have houses and you have to furnish it yourself.

Q. Do you recall the address on Summit Court?

A. Salerno Street.

Q. How long did you reside there?

A. One or one and one-half years.

Q. Who lived with you at this address?

A. My little girl. You asked me before if my husband took the children and I said yes, but I went after them.

Q. Your previous statement reflects your place of residence and you read this statement this morning. Is this

statement correct as to your places of residence and employment?

A. Yes.

Q. Your previous statement reflects that you admitted having illicit relationship with other men and engaging in sexual acts with them. Do you recall when you first started practicing such acts?

A. I wouldn't say I was practicing. I started going out with men but I know it was after my husband died.

Q. How soon after your husband died did you engage in illicit sex acts with other men?

A. After Christmas after I found out my husband was dead.

[fol. 13] Q. Would that be in January 1958?

A. It could be, yes.

Q. Where were you living?

A. 1500 W. River View.

Q. What money did you receive for such acts?

A. Gifts.

Q. What do you mean by gifts?

A. I mean gifts—if anybody give me anything—he give me money.

Q. Did you entertain more than one man each evening?

A. No sir.

Q. Did you have an established price for your acts of sex relationship?

A. No sir.

Q. Did you accept payment for such acts?

A. No.

Q. Did anybody solicit or engage men to come and visit you and engage in sex acts?

A. No.

Supervisory Investigator Kaler to respondent:

Q. Mrs. Woodby, when is the very first time in your life that you had sexual relations with a man to whom you were not married?

A. I only had with men I knew, and you don't know any woman who don't have intercourse with a man if she thinks he love her.

Q. I repeat, when was the very first time you had intercourse with a man to whom you were not married?

A. I don't know how to answer that question.

Q. I would suggest that you tell the truth?

A. I always tell the truth, so far. It is hard to answer. I maybe had sex with somebody I don't want to have, and it was with a Russian or a Hungarian.

Q. What year was this?

A. In 1946.

Q. Where?

A. Hungary.

Investigator Porter to respondent:

Q. Budapest?

A. Yes.

[fol. 14] Supervisory Investigator Kaler to respondent:

Q. Did you receive money or other compensation for this act?

A. You mean from the first time?

Q. Yes.

A. How could I; I wasn't asking for being raped.

Q. When did you leave Hungary?

A. 1946.

Q. Where did you go from there?

A. To Germany.

Q. Where did you reside in Germany?

A. Erlangen.

Q. Were you in a displaced persons camp there?

A. About for three months, yes.

Q. Where did you move to when you left the displaced persons camp?

A. Eschenau.

Q. With whom did you live there?

A. My mother and two aunts.

Q. How long did you reside with your mother?

A. Two years. My mother died after that, then I moved to Erlangen. It is a city and my mother was in a hospital there.

Q. Where did you meet your former husband?

A. About a year and one-half before the baby was born.

Q. Where did you meet your former husband?

A. Nurnberg.

Q. With whom were you living at that time?

A. My myself.

Q. Were you living with your former husband prior to the time you were married?

A. No. He was stationed in Nurnberg and I was living in Erlangen.

Q. Did you have sexual intercourse with your former husband before you were married?

A. Do I have to answer that?

By attorney: Yes, go ahead.

[fol. 15] By respondent:

A. Yes.

Supervisory Investigator Kaler to respondent:

Q. When did this sexual relationship first start?

A. About six months.

Q. How frequent were these relations?

A. About once a month.

Q. Did you receive money or any other compensation for these acts?

A. No.

Q. Were you living together as man and wife with your former husband?

A. No.

Q. When did you first start living with your former husband?

A. After we were married in January.

Q. Did you engage in sexual acts with any other men in Germany while you were residing in Germany and prior to the time you met your husband?

A. No.

Q. Did you engage in sexual acts with any other men between the time you first met your former husband and when you were married to him?

A. No.

Q. With how many men did you have sexual relations prior to the time you married your husband?

A. I didn't.

Q. You better think about that answer?

A. I am thinking about it very good. I worked and had to support my mother in the hospital and did not have time to go out.

Q. I will repeat the question. With how many men did you have sexual relations prior to the time you met your husband?

A. That was the first time in Hungary.

Q. Who is the father of your son Leonard Clarence Woodby?

A. John Henry Woodby.

Q. With how many men have you engaged in sexual relations since your marriage to your former husband?

A. I don't know.

Q. About how many?

A. I was out with a couple of guys but I didn't have [fol. 16] sexual relations with them the first time. If I did have it was because I thought he loved me. I would say in answer to the question, about three times.

Q. Does your answer mean you had sexual relations with three men since your marriage to your former husband?

A. Yes.

Q. Where did these acts occur?

A. At my place.

Q. Where was this—at what address?

A. It was on 1500 W. River View.

Q. During what period was this?

A. About three years ago.

Q. What are the names of these men?

A. On W. River View it was Mr. Amicon.

Q. Who else did you have sexual relations with other than Mr. Amicon?

A. It was on Summit Court.

Q. Who with?

A. Bill Waddell.

Q. Who else?

A. Kincaid.

Q. Where does Mr. Waddell live?

A. I don't know.

Q. Where did he live at that time?

A. I don't know. He was living in Dayton.

Q. Where did Mr. Kincaid live?

A. In Dayton too.

Q. Where did you meet Mr. Waddell?

A. Through a girl friend.

Q. What payment or compensation did you receive from Mr. Waddell for your sexual acts?

A. No money; I was going with him.

Q. How many times did you have sexual relations with Mr. Waddell?

A. Twice.

[fol. 17] Q. Where did both these acts occur?

A. At my place.

Q. At what address was that?

A. 24 S. June St., Dayton.

Q. What is the name of the girl friend who introduced you to Mr. Waddell?

A. Ann Brolliss (I don't know how to spell her name).

Q. Where did she live?

A. Right behind Notre Dame.

Q. Was that a street which was parallel to Notre Dame?

A. Right behind Notre Dame; the next parallel street.

Q. Where was Ann working at that time?

A. She is married and not working.

Q. Was she living with her husband?

A. Yes.

Q. What is her husband's name?

A. Tom.

Q. Where did he work?

A. I don't know. The last time I know he was working in a filling station.

Q. Where?

A. I don't know.

Q. Where did you meet Mr. Kincaid?

A. I met him through my girl friend what helped me get a job?

Q. What is her name?

A. Freda Filow.

Q. Where does Freda live?

A. She live in Summit Court.

Q. Where was she employed?

A. McCroy's.

Q. Do you know where Freda lives now?

A. No.

Q. How many times did you have sexual relations with Mr. Kincaid?

A. Once.

[fol. 18] Q. Did you receive payment from him?

A. No sir.

Q. Have you had sexual relations with any other man other than Mr. Amicon, Mr. Waddell, Mr. Kincaid?

A. No.

Q. Has your son Leonard Clarence Woodby ever been ill?

A. So far as I know one time.

Q. Has he ever been in a hospital?

A. Yes.

Q. What was the nature of his illness?

A. I don't know.

Q. What hospital?

A. In Harlan, Ky.

Q. When was this?

A. I was living in Summit Court. I would say six or eight months after he was born.

Q. How did you become aware that your son was in the hospital?

A. Because my husband asked me for money.

Q. How long did he remain in the hospital?

A. One month.

Q. Did he have an operation?

A. That is what my husband said. I don't know.

Q. Who paid for the hospital bills?

A. I did. I gave my husband the money.

Q. How much money did this require?

A. \$300.

Q. Where did you get this money, Mrs. Woodby?

A. I loaned.

Q. Where did you borrow it?

A. Some from my employer.

Q. How much did you borrow from your employer?

A. \$150.00.

[fol. 19] Q. Who was your employer?

A. Neal Schoford.

Q. Where did you get the rest of the money?

A. I would rather not answer that question.

Attorney to respondent: I don't think there is anything wrong in answering that. Go ahead and tell them who you borrowed it from.

Supervisory Investigator to respondent:

Q. I repeat the question, where did you get the rest of the money?

A. From a man.

Q. What was this man's name?

A. Tom.

Q. What was his last name?

A. I don't remember. I think I do—Wally.

Q. Where does Tom Wally live?

A. I don't know.

Q. Where did he live then?

A. He lived in Dayton.

Q. What was the nature of his business?

A. Vacuum cleaner.

Q. Vacuum cleaner salesman?

A. Yes.

Q. Where did you meet him?

A. At my place. He demonstrated it.

Q. Have you paid back the loan of \$300.00?

A. Yes.

Q. Did you have sexual relations with Tom Wally?

A. No.

Q. When did you pay this \$150.00 to Tom Wally?

A. I paid him back when I got it.

Q. Did you repay him \$150.00 at one time?

A. No.

Q. Is Tom Wally married?

A. Yes.

[fol. 20] Q. What did you offer Tom Wally as security for this loan?

A. I didn't give him security.

Q. Mrs. Woodby, did you ever tell anyone that you had sexual relations with men in order to acquire money to pay for your son's hospitalization?

A. Yes.

Q. Whom did you tell this to?

A. I didn't. Tom Wally did.

Q. Tom Wally did; is that your answer?

A. Yes.

Q. How much of this \$300.00 did you acquire as a result of having sexual relations with men, Mrs. Woodby?

A. I don't ask for the amount.

Q. How much did you acquire—how much of that \$300.00?

A. I would say sometimes \$5.00 and sometimes \$10.00.

Q. Sometimes \$5.00 and sometimes \$10.00?

A. No, I did not ask for that.

Q. How much did you get?

A. They just gave it to me as a gift and I couldn't tell you how much it was.

Q. How much money did you get altogether? Was it \$200.00?

A. No.

Q. Was it \$250.00?

A. No.

Q. Did you receive \$200 altogether as a result of having sexual relations with men?

A. I don't ask for the money.

Q. The question is, how much did you receive?

A. I would say about \$40.00 or \$50.00.

Q. Altogether?

A. Yes.

Q. Was the \$40.00 or \$50.00 received from one man at one time?

A. No.

[fol. 21] Q. What is the last money you received from a man as a result of having sexual relations at any time?

A. I don't know.

Q. How much did you receive?

A. Sometimes they gave me as a present \$5.00. Once in a while they came up with something and gave me \$10.00.

Q. You did receive as you previously stated, a total of \$40.00 or \$50.00 as a result of having sexual relations with men?

A. I wouldn't say I had sexual relations, no.

Q. Did you have sexual relations with the men you received the money from?

A. No.

Q. Has anyone told you to answer the questions as to money received as a result of sexual relations with men in the negative? Have you been told to say you didn't receive money from men with whom you had sexual relations?

A. No.

Q. Where did you get the \$300.00 you paid back to these people?

A. My employer took it out of my pay. The rest I gave to him every week.

Q. In your answer to previous questions, you stated you had received a total of \$40.00 or \$50.00 as the result of having sexual relations with men. This time I would appreciate the truth.

A. When I needed the \$300.00, Mr. Wally came over to the house the first time I met him. I was crying this time and told him I could not afford a vacuum cleaner; that I had more important things to pay for, and he asked me what for and I told him. He told me he would show me first how I could have the \$300.00 if I needed it very bad. He told me and I did it because I needed money. Mr. Wally sent men to my place. I did not know at the time it was prostitution. If it was prostitution I did not recognize it as what I was doing. Men paid me \$10.00, and sometimes \$5.00. I didn't take the money. They laid it on the table. I didn't ask for the certain amount. After I had the \$300.00 I sent it to my husband. So far as I know the boy had the operation and is O. K. I am not sure if it was for the boy or if it was for my husband.

Q. How soon after you met Mr. Wally did you entertain and have sexual relations with a man he had sent to you?

A. About two months.

Q. Where did you live at that time?

A. The first time in Summit Court.

[fol. 22] Q. How often did Mr. Wally send you men for the purpose of having sexual relations?

A. Two a day.

Q. How many days a week?

A. Three or four days.

Q. What time of day was this?

A. After 1:30 after I got home from work.

Q. In the morning?

A. Afternoon. I was working from 11:00 A. M. to 1:30 P. M., and I went back to work at 5:00 P. M.

Q. What is the least amount you received from any men who were sent to you by Mr. Wally?

A. \$5.00.

Q. What was the most?

A. \$10.00—I would say \$15.00.

Q. To your knowledge, how much money did Mr. Wally receive from these men?

A. I don't know—about \$5.00 I think.

Q. How long did these arrangements continue?

A. About two months.

Q. Did these all occur at the Summit Street address?

A. Yes.

Q. Did he regularly send two men to you each day?

A. Not each day, because I was working. I would say about two each day.

Q. How many days a week?

A. About four.

Q. This continued for approximately eight weeks?

A. Yes.

Q. Do you know where Mr. Wally met these men?

A. No. I think he met them from car salesmen.

Q. Do you know who any of these men are?

A. No.

Q. Why did you terminate your arrangement with Mr. Wally?

A. Because I was home alone.

[fol. 23] Q. Why did you terminate this arrangement with Mr. Wally?

A. Because I had my \$300.00.

Q. These various other men you have named, Mr. Kincaid, Mr. Amicon, and Mr. Waddell, did you have relations with these men during the same period you were receiving men from Mr. Wally?

A. No sir. I met Mr. Amicon and he was the one who made me realize what I was doing.

Q. These men previously named, did you meet them after you terminated your arrangement with Mr. Wally?

A. Yes.

Q. All of them?

A. Yes.

Q. Have you engaged in sexual relations with any other men since the termination of your arrangement with Mr. Wally?

A. Not for payment, no.

Q. Were you so engaged prior to your arrangement with Mr. Wally?

A. What do you mean.

Q. Did you have sexual relations with men prior to your arrangement with Mr. Wally?

A. No.

Q. Did you ever receive payment from men for such relations prior to coming to the United States?

A. No sir.

Q. Are you now aware that the relations you had with men who were sent to you by Mr. Wally was prostitution?

A. I did not recognize it as that.

Q. Do you know now?

A. Now I know, yes.

Q. How did you break off your arrangement with Mr. Wally?

A. I just told him not to send anybody any more; I don't want to do it any more.

Q. Did Mr. Wally attempt to get you to continue this arrangement after that time?

A. Yes.

Q. Did he threaten you in any way?

A. Not direct.

[fol. 24] Q. In what way did he threaten you?

A. First he said he would report me.

Q. To whom did he threaten to report you to?

A. I guess the police.

Q. Did you recall the name of the vacuum cleaner he sold?

A. I don't know.

Investigator Porter to respondent:

Q. Was it Hoover?

A. I don't know.

Supervisory Investigator Kaler to respondent:

Q. When did you meet Mr. Amicon?

A. About three years ago.

Q. Where did you meet him?

A. I met him through a friend of his.

Q. Was this after the termination of your arrangement with Mr. Wally?

A. No. It was after I met Mr. Amicon that I quit the arrangement with Mr. Wally.

Q. What was the nature of your relationship with Mr. Amicon?

A. Friends.

Q. Did you live with him as man and wife?

A. No sir.

Q. Did you live with him?

A. I was not living with him.

Q. Did you have sexual relations with Mr. Amicon?

A. Yes.

Q. How long after you met Mr. Amicon did you commence having sexual relations?

A. Three months after.

Q. How long did this relationship continue?

A. The first sexual relationship is about three months after I met him.

Investigator Porter to respondent:

Q. The first time you met Mr. Amicon didn't he come to your apartment to have sexual relations with you?

A. Yes, he came for that but he did not after he came.

[fol. 25] Supervisory Investigator Kaler to respondent:

Q. Are you sure?

A. Yes, I am sure.

Q. Did he leave money in your room the first night he met you?

A. Yes.

Q. Why did you not have sexual relations with Mr. Amicon?

A. I guess he didn't want it after he met me.

Q. Did Mr. Wally send Mr. Amicon to you?

A. No, somebody else sent him.

Q. Do you know who this person is?

A. No. It could be Wally. I don't remember.

Q. How long did your relationship with Mr. Amicon continue?

A. I know him for three years already.

Q. Have you had sexual relations with Mr. Amicon regularly since the first time?

A. No.

Q. How long did you continue having sexual relations with Mr. Amicon?

A. Since we started going together until about six months ago.

Q. How frequently did you have sexual relations with Mr. Amicon?

A. Once or twice a week.

Q. How much money have you received from Mr. Amicon?

A. He did not pay me for that.

Q. How much money have you received from Mr. Amicon?

A. He helped me out when I needed it and I helped him out when he needed it.

Q. Approximately how much money did you receive from him altogether?

A. I would say I didn't receive money from him at all. If he needed money and I loaned it to him and he gave it back.

Q. Did he give you more than you gave him?

A. Yes.

Q. Did he ever pay your rent?

A. No.

Q. Did he ever buy you food?

A. Yes.

[fol. 26] Q. Did he buy you clothing?

A. Last year for Christmas he gave me a coat and a pair of slacks and a blouse.

Q. Did he ever buy you jewelry?

A. No, not as I recall.

Q. How often did he buy food and necessities for you?

A. He brought me food from his place where he is working.

Investigator Porter: He has a produce market.

Supervisory Investigator Kaler to respondent:

Q. As a result of the \$300.00 you received from your arrangement with Mr. Wally, did you also borrow money from your employer?

A. No sir. As I said before I changed my story.

Q. Your prior statement that you borrowed \$150.00 from your employer is untrue?

A. It is not true.

Q. Have you seen Mr. Wally since you terminated your arrangement with him?

A. No, I have not for about three and one-half years.

Q. Have you been approached by anyone since that time for the purpose of setting up a similar relationship?

A. No, just guys I had relationship with came back and asked me if I would do it and I said no.

Q. Did they come on their own?

A. Yes.

Q. Did they tell you they came on their own?

A. Yes, to try to get me to do it.

Q. Did Mr. Wally send you men after you told him you were finished?

A. Yes.

Q. What did you tell these men?

A. I told them I am not doing it any more.

Q. How long after you terminated your arrangement with Mr. Wally did you move?

A. About two months later.

[fol. 27] Q. Where did you move this time?

A. I was staying with my girlfriend for a while. She was living at 19 Cumberland St. She lived there and I lived with her until she got married.

Q. What was her name?

A. Eileen Jackson.

Q. Do you know the names of any other girls who were working for Mr. Wally?

A. I know girls yes, but I don't know their names.

Q. How many other girls were working for Mr. Wally other than yourself?

A. So far as I know, two.

Q. Did they have employment other than working for Mr. Wally?

A. No.

Q. Were they engaged in prostitution on a full time basis?

A. I think so.

Q. Do you know the names of these girls?

A. No.

Q. Did you ever meet these girls?

A. One.

Q. Where was she engaged in prostitution?

A. I guess in her apartment. I don't know.

Q. Where did you meet her?

A. Through Mr. Wally.

Q. What physical location?

A. I don't remember, but Mr. Wally brought her to my place.

Q. Did this girl use your apartment for the purpose of engaging in sexual relations with men?

A. She did but I did not know it.

Q. Were you there at the time?

A. No.

Q. Where were you?

A. At work.

Q. Did this girl use your apartment for the purpose of engaging in prostitution without your knowledge?

A. Not with my knowledge, no.

[fol. 28] Q. Did Mr. Wally have your permission to send her there?

A. I don't know the girl. Mr. Wally said she is a good friend of his and he asked if she could stay until she got an apartment.

Q. How long did she stay in your apartment?

A. About a week or two.

Q. How did you become aware that she was using your apartment for the purpose of prostitution?

A. Because I interrupted her one time. She didn't expect me to come home.

Q. Did you come home early from work?

A. Yes.

Q. How long did she continue living in your apartment after that?

A. She move right away.

Q. Did you tell her to move?

A. Yes.

Q. Did other girls use your apartment for engaging in prostitution?

A. None. There wasn't anybody except her, and I just wanted to help her out.

Q. What was her name?

A. Jo.

Q. Do you know her last name?

A. No.

Q. Where was she from?

A. She said from Tennessee.

Q. Do you believe she was from Tennessee?

A. Yes, but later I find out she wasn't.

Q. Where was she from?

A. She was living here all the time. She still had her apartment. Mr. Wally brought her over and told me she just came to town and I didn't know it them.

Q. Where was the other girl who was working for Mr. Wally?

A. I don't know. I never met her.

Q. Other than the two you have mentioned, do you know any other girls in Dayton who were engaged in prostitution?

A. No.

Q. After you moved from your residence on Summit Street, did Mr. Wally attempt to send you men at the new address?

A. No.

[fol. 29] Supervisory Investigator Kaler to Investigator Porter:

Q. Mr. Porter, do you have any questions?

Investigator Porter to respondent:

Q. In your previous statement you have indicated you went to Knoxville, Tenn. Did you go to Knoxville as a result of Mr. Wally's request?

A. No.

Q. Did you know Mr. Wally at that time?

A. Yes. Oh, yes! I did.

Q. Did he ask you to go to Knoxville, Tenn. to practice prostitution?

A. Yes.

Q. Did he take you to Knoxville?

A. No.

Q. Did he furnish you transportation?

A. No.

Q. How long did you practice prostitution in Knoxville?

A. Not at all. I was working at the Brown Derby.

Q. Did you go to Knoxville for that purpose?

A. No, I did not. I went because after they found out in court that this Jo was practicing prostitution in my apartment they told me to leave.

Q. Who told you to move?

A. The court.

Q. Were you using a different name at that time?

A. No.

Q. What do you mean by the court?

A. The housing project.

Q. Where are your children living at this time?

A. Not with me, no.

Q. Have you taken any steps to obtain custody of your children?

A. Yes, I did.

Q. Has this been through legal court procedure?

A. Yes.

[fol. 30] Q. Who is representing you in your effort to obtain custody of your children?

A. Mr. James C. Bruck, Harlan, Ky., an attorney.

Q. Did you ever tell anyone you practiced prostitution in your native country in order to live?

A. No, because I paid my own way.

Investigator Porter: I have no more questions.

Supervisory Investigator Kaler to respondent:

Q. Mrs. Woodby, have you understood all of the questions asked you in this statement today?

A. Yes. Some of it was hard but I know what you mean.

Q. Do you have anything you wish to say at this time?

A. Yes, one thing. I am very sorry I got mixed up and got in that mess.

CLOSED

I certify that the foregoing record of statement, pages 1 through 22, is a true and correct transcript of the testimony recorded by me at the time the statement was made.

Alice C. Ballinger, Reporting Stenographer.

[fol. 32]

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

ORDER TO SHOW CAUSE AND NOTICE OF HEARING—

January 9, 1962

In Deportation Proceedings under Section 242 of the
Immigration and Nationality Act

File No. A10 331 472

UNITED STATES OF AMERICA:

In the Matter ofELIZABETH ROSATIA WOODBY, Respondent.

To Elizabeth Rosatia Woodby, 940 Old Orchard, Dayton,
Ohio.

Upon inquiry conducted by the Immigration and Natural-
ization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Hungary and a citizen of Ger-
many;
3. You last entered the United States at New York, N. Y.
on or about February 7, 1956;
4. You have engaged in prostitution after entry.

And on the basis of the foregoing allegations, it is
charged that you are subject to deportation pursuant to
the following provision(s) of law:

Section 241(a)(12) of the Immigration and Nationality
Act, in that, by reason of conduct, behavior or activity
at any time after entry you became a member of any

of the classes specified in section 212(a)(12), to wit, aliens who have engaged in prostitution.

Wherefore, You Are Ordered to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 708 U.S. Post Office & Courthouse Bldg., Cincinnati, Ohio, on January 25, 1962 at 10:00 a.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: January 9, 1962

Immigration and Naturalization Service, Richard G. Hill, Acting Assistant District Director, Investigations, Cleveland, Ohio.

[fol. 33] Notice to Respondent

The Copy of This Order Served Upon You Is Evidence of Your Alien Registration While You Are Under Deportation Proceedings. The Law Requires That It Be Carried With You at All Times.

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you will be permitted, if you wish, to admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may

constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

Whether or not you admit your deportability, you will have an opportunity at the hearing to apply for any discretionary relief from deportation to which you believe you are entitled.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

Request for Prompt Hearing

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

.....
(signature of respondent)

.....
(date)

Before:

.....
(signature and title of witnessing officer)

Certificate of Service

This order and notice were served by me on January 9, 1962 in the following manner:

Served on respondent in person, Room 210, U. S. Post Office, Dayton, Ohio.

W. Nelson Brown.
Inv.

[fol. 34]

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

In Deportation Proceedings

File A10 331 472

Matter of

ELISABETH ROSALIA WOODBY, Respondent.

**Transcript of Hearing Before Special Inquiring
Officer of March 28, 1962**

Before Special Inquiry Officer Richard P. Lott.

**Hearing held on March 28, 1962, at Federal Building,
Cincinnati, Ohio.**

Recorded by Gray Audograph machine.

Transcribed by Hays Campbell.

Language English.

APPEARANCES

In Behalf of Service:

W. Nelson Brown, Examining Officer, Cincinnati, Ohio.

In Behalf of Respondent:

**Sidney G. Kusworm, Sr., Esquire, Jacob A. Myers, Es-
quire, 403 Keith Building, Dayton, Ohio.**

**[fol. 35] Special Inquiry Officer: This is a deportation
hearing accorded Elisabeth Rosalia Woodby, file A10 331
472, by reason of the issuance of an order to show cause
dated January 9, 1962. The hearing is being held on March
28, 1962, at the Federal Building, Cincinnati, Ohio, before**

Special Inquiry Officer Richard P. Lott. The respondent will testify in the English language. Appearances: On behalf of respondent, Sidney G. Kusworm, Sr., Esquire, and Jacob A. Myers, Esquire, 403 Keith Building, Dayton, Ohio; on behalf of the Service, no one.

Special Inquiry Officer to Respondent:

Q. Now, Mrs. Woodby, this hearing is being held as I've explained because this order to show cause has been issued, but before we open the hearing I have a few preliminary statements and questions. Now, do you speak and understand English?

A. Yes.

Q. Will you stand and raise your right hand, please? Do you solemnly swear that all the testimony that you shall give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. You may be seated. Will you repeat your name, please?

A. Elisabeth Rosalia Woodby.

Q. And what is your age?

A. Twenty-nine.

Special Inquiry Officer: Now, this order to show cause is the Government's statement that you are subject to deportation and the purpose of this hearing is to make that de-[fol. 36] termination whether you are now subject to being deported and also to give you a chance to state your reasons why you should not be deported. Will counsel identify themselves for the record?

Mr. Kusworm: I am Sidney G. Kusworm, Sr., Dayton, Ohio, 403 Keith Building. I'm a member of the federal bar and the bar of the State of Ohio, and practicing law for fifty-four years.

Mr. Myers: I'm Jacob A. Myers, associated with the law firm of Kusworm and Kusworm, 403 Keith Building, Dayton, Ohio, member of the Ohio bar and of the federal bar.

The Special Inquiry Officer: As counsel know, at this hearing you have the right to examine all the evidence, present evidence in your own behalf, object for the record to anything that you consider improper, and to cross-examine any Government witnesses.

By Special Inquiry Officer to Respondent:

Q. Have you received a copy of this order to show cause?

A. Yes.

The Special Inquiry Officer: The original will be entered as a matter of record as Exhibit No. 1.

The Special Inquiry Officer: And, as counsel know, the Government relies upon the accuracy of the four allegations to sustain the charge of deportability. I assume that the first allegation, that the respondent is not a citizen or national of the United States, will be admitted?

[fol. 37] Mr. Kusworm: I think so, yes.

The Special Inquiry Officer: And the second, that she is a native of Hungary and a citizen of Germany, will that be admitted? The answer is yes?

Mr. Myers: Yes, sir.

The Special Inquiry Officer: And the third, that she last entered the United States at New York, New York, on or about February 7, 1956, is that admitted?

Mr. Myers: Yes, sir.

The Special Inquiry Officer: And the fourth, that she has engaged in prostitution after entry, I understand that is disputed?

Mr. Kusworm: Yes, sir.

The Special Inquiry Officer: The record will show the appearance of W. Nelson Brown, Examining Officer, Cincinnati, Ohio, on the issue of deportability as raised by the fourth allegation in the order to show cause. You may proceed, Mr. Brown.

By Mr. Brown to Respondent:

Q. Mrs. Woodby, I believe that you came to this office in November, November the 20th, and at that time, November

20, 1961, at that time you made a statement before Investigators Larry J. Porter and E. A. Kaler in company with your counsel, then Earl H. Moore of Dayton. Is that correct?

[fol. 38] A. That is correct.

Mr. Brown to the Special Inquiry Officer: I have here a record of the testimony of sworn statement made at that time which I should like to present to the special inquiry officer for his information and inclusion in the record of this proceeding. This is a transcript made by the stenographer, Reporting Stenographer Alice C. Ballinger, at the time that this was made. I present this...

Mr. Kusworm to the Special Inquiry Officer: Is it signed? Is it signed by her? We've never seen it, your honor, and therefore object to its introduction.

The Special Inquiry Officer: Well, I think that counsel should first examine it so that you can make whatever objections you have. We will recess while you examine it.

Hearing Recessed.

Hearing Resumed.

Mr. Kusworm to the Special Inquiry Officer: If your honor pleases, you were kind enough to declare a recess to give us the opportunity to read this statement with our client, which had not been seen by us before. After reading it, we find that there are certain discrepancies in the statement, dates, etcetera, and we object to its introduction and suggest that the distinguished examiner for the Service interrogate the witness on any items that appear in the statement, at the present time.

The Special Inquiry Officer: Is that satisfactory to you, Mr. Brown?

[fol. 39] Mr. Brown: Counsel, is the objection on the basis that the statement is not correct or is the objection on the basis that—in other words, that the statement was not understood? I'm not clear as to just what the objection is.

Mr. Kusworm: We object on the ground that it is not correct in certain parts and, because she's a foreigner, there

are certain questions that could not have been understood by her or she wouldn't have answered as she did, because we've gone into the case thoroughly with her and we know the truth of the matter, and we want to bring out the truth, all of the facts in this case.

By Mr. Brown to Respondent:

Q. Do you admit that you made this statement here on that date? After examining it, that this could be the same record of your statement?

The Special Inquiry officer: Speak up, please.

Mr. Kusworm: In certain respects? He wants to know if everything there, that is in that statement, is correct.

By Respondent:

A. Not everything, no.

By Mr. Brown to Respondent:

Q. Then could you state...

A. But I did change my story and I did tell the truth.

Q. You did what? I didn't hear you.

A. Well, at first I tried to help myself I guess and I didn't tell the truth first, but then in the end I did—told Mr. Porter, the bigger fellow here, that I want to make a state-[fol. 40] ment and tell the whole truth.

Q. And you had counsel present when this statement was made, did you not?

A. Yes.

Mr. Brown to the Special Inquiry Officer: And the objections of counsel, Mr. Special Inquiry Officer, as far as I can see are such that I would request before I proceed with any further examination a ruling on the objection to the introduction of this statement.

The Special Inquiry Officer: Well, I think under our regulations I'm obliged to accept it.

Mr. Kusworm: Note our exception.

Mr. Brown to the Special Inquiry Officer: I want this to be an exhibit in this proceeding.

The Special Inquiry Officer: It will be accepted as Exhibit 2.

Mr. Kusworm: To which we object.

By Mr. Brown to Respondent:

Q. Mrs. Woodby, where are you living at the present time?

A. At 940 Old Orchard, Dayton, Ohio.

Q. Since you were in this office on November 20, 1961, have you changed your marital status in any way?

Mr. Kusworm: You might explain what that means. She's a foreigner.

By Mr. Brown to Respondent:

[fol. 41] Q. Have you changed your marital status? In other words, have you been married or in any other way changed your status from a single person to a married person?

A. No, not yet.

Q. You are a widow, is that correct?

A. (no audible answer)

Q. Where are you working?

A. At Neil's Restaurant, Dayton, Ohio.

Q. The same place that you were employed when you were here last November?

A. Yes.

Q. You're employed there as a waitress, is that correct?

A. Yes.

Q. Mrs. Woodby, I note in Exhibit No. 2 here on Page 13 certain questions and answers which I would like to read to you and get your answers to. The question was asked, "In your answer to previous questions, you stated you had received a total of \$40 or \$50 as a result of having sexual relations with men. This time I would appreciate the truth."

The answer: "When I needed the \$300.00, Mr. Wally came over to the house the first time I met him. I was crying this time and told him I could not afford a vacuum cleaner; that I had more important things to pay for, and he asked me what for and I told him. He told me he would show me first how I could have the \$300 if I needed it very bad. He told me and I did it because I needed money. Mr. Wally sent men to my place. . . . I did not recognize it as what I was doing. Men paid me \$10.00 and sometimes \$5.00. I didn't take the money. They laid it on the table. I didn't ask for a certain amount. After I had the \$300.00 I sent it [fol. 42] to my husband. So far as I know the boy had the operation and is O.K. I am not sure if it was for the boy or if it was for my husband." Question: "How soon after you met Mr. Wally did you entertain and have sexual relations with a man he had sent to you?" Answer: "About two months." "Where did you live at that time?" "The first time in Summit Court." "How often did Mr. Wally send you men for the purpose of having sexual relations?" "Two a day." "How many days a week?" "Three or four days." Question: "What time of day was this?" "After 1:30, after I got home from work." Question: "In the morning?" "Afternoon. I was working from 11:00 A.M. to 1:30 P.M., and I went back to work at 5:00 P.M." "What is the least amount you received from any men who were sent to you by Mr. Wally?" "\$5.00." Question: "What was the most?" "10.00—I would say \$15.00." "To your knowledge, how much money did Mr. Wally receive from these men?" Answer: "I don't know—about \$5.00 I think." Question: "How long did these arrangements continue?" Answer: "About two months." Question: "Did these all occur at the Summit Street address?" Answer: "Yes." Question: "Did he regularly send two men to you each day?" "Not each day because I was working. I would say about two each day." Question: "How many days a week?" "About four." Question: "This continued for approximately eight weeks?" Answer: "Yes." Question: "Do you know where Mr. Wally met these men?" Answer: "No. I

think he met them from car salesmen." Question: "Do you know where any of these men are?" Answer: "No." Question: "Why did you terminate your arrangement with Mr. Wally?" Answer: "Because I was home alone." Question: "Why did you terminate this arrangement with Mr. Wally?" Answer: "Because I had my \$300.00." Are those questions and answers as I have read them to you correct, [fol. 43] Mrs. Woodby?

A. That's what I said.

Q. Were you ever arrested in Dayton, Ohio?

A. No.

Q. Did the police ever come to your home?

A. Yes.

Q. What month was that?

A. It's not too clear at this time.

Q. How many years ago was it?

A. Three years—four years.

Q. Four years ago? Could it have been around February 27, 1959?

A. It could be, but I'm not sure.

Q. What happened? Why did the police come around?

A. I don't know right why, but they wanted to take a statement from me about practicing prostitution.

Mr. Kusworm: Talk up. I've got to hear you. What did you say just now?

By Respondent: They don't ask for her. They won't take her from me without a positive promise to pay. What if I don't pay.

By Mr. Kusworm to Respondent:

Q. Well, did you give them the statement?

A. No, I did not.

By Mr. Brown to Respondent:

Q. Did you go to court?

A. No, I did not.

[fol. 44] Q. Was anybody else present at the time that they came in?

A. Yes, Mr. Amicon and my child.

Q. And your child. You mentioned that the police asked you to make the statement, but you didn't make the statement, is that right?

A. I couldn't. I was not a prostitute.

Q. In other words, then, did you deny to them that you were practicing prostitution?

A. That's right, because I let them in without the search warrant, but he wanted to take my child away and put her in Shawn Acres. He comes to get a statement from me that I was practicing prostitution. Mr. Amicon was there and my child. The door was open. He knocked on the door and he come in and wanted to talk to me. "I did not get a search warrant to come in, but I'd like to get this written down about the little girl." So he wanted me to sign the papers.

Mr. Kusworm:

Q. The what?

A. Sign some papers.

Q. Oh, papers?

A. Yes, papers.

Q. All right.

A. Said he probably was going to take the child and put her in Shawn Acres.

Q. Put the child where?

Mr. Brown: Shawn Acres.

Mr. Kusworm: Oh, Shawn Acres. That's a home for children. Go on.

[fol. 45] The Respondent:

A. And I'm not so sure if I signed those papers or not. I never was in court.

By Mr. Brown to Respondent:

Q. Is that the only time the police ever came to your residence, to your home?

A. Yes.

Q. Were you ever questioned by the police at any other time in connection with alleged prostitution?

A. No, sir.

Q. Now, you have stated that the time that this Wally, I believe it is, sent men to you, that you acquired a total of about \$300, is that right?

A. Yes.

Q. And what was your reason for needing the \$300?

A. I was working and I had my little girl and I was supporting her. My husband, he called me long distance the day before. He told me that he needs \$300 to give to the hospital and I asked him when the boy gets in and he told me same day and he needs operation the next couple of days. He needs the money, but he can't—they won't operate on the boy because he doesn't have insurance, said he needed cash. And I told him that I would try to get it if I can, it sounded strange, but I don't have it. And I was supposed to get it where I was employed by my employer, that's the next day, the day that Mr. Wally was up there giving shows to people and I was crying when he drove up there.

By Mr. Kusworm to Respondent:

Q. Why were you crying?

[fol. 46] A. I was crying because I needed the \$300 and I didn't know some place to get it.

Mr. Kusworm: Go ahead. I just wanted to interrogate her as to what her husband told her about what would happen to the child if she didn't pay the \$300.

The Respondent: And Mr. Wally told me that he could tell me how to get the money fast if I needed it. And I asked him what he means and he told me. And I said, "No, I can't do it." He said, "Well," he says, "I would not cry

about this money, not so bad as you think." He went outside and he brought a fifth in from the car.

By Mr. Kusworm to Respondent:

Q. He did what?

A. A bottle.

Q. He went outside and got it?

A. Yes. Then he come back. And he was with another gentleman, there was two, and they sat at the table and I was not used to drinking at the time and I was drinking and they take some pictures first on the table.

By Special Inquiry Officer to Respondent:

Q. Pictures from you or of you?

A. Both.

By Mr. Kusworm to Respondent:

Q. Pictures of you?

A. Well, of me.

Q. They wanted to show them, is that it?

A. Yes. And then Tom Wally, Mr. Wally, he stop by every day. He'd send me the guys and he always brought [fol. 47] the bottle and I was drinking heavy at the time and even after that I had the \$300, I told Mr. Wally that I don't want to see him any more, I got through.

Q. What about after you got the \$300? I just want to hear you and I want the judge to hear you?

A. After I had the \$300 I sent it to my husband. And Tom Wally still come around sending customers and I told him I was through, I don't have nothing to do with it.

Q. Were you through?

A. I was, yes. He frightened me at first. He told me he was going to go to the immigration and tell them and the police that I think of it, if I don't do it again.

Q. Who told you that?

A. Tom Wally. He frightened me and I guess I did it for

—I don't want to lie—I think it was another two weeks. See, I met Mr. Amicon. He asked me—told me what I was doing.

Q. And what did you?

A. I sent the \$300 away.

By Special Inquiry Officer to Respondent:

Q. I don't understand you.

A. I sent the \$300 to my husband, but much later than I find out here, working here all day.

Q. Well, this \$300, weren't you able to accumulate that?

A. No. Yes, I accumulated it.

Q. And was it after the three months you sent the money to your husband?

A. No, I sent it as quick as I had it.

[fol. 48] By Mr. Kusworm to Respondent:

Q. The man wants to know whether he held it.

A. Yes, Mr. Wally give me this \$300, but I had to work it for him out.

By Special Inquiry Officer to Respondent:

Q. You mean you had to pay him back?

A. Yes. And when I had it, I suppose he threatened me if I don't do it again because he missed the money and as far as I was concerned I didn't feel very much about this man, who he was or what. And he threatened he was going to report me to the immigration if I did it—if I'm not going to do it. I guess he did it because it was all in the newspapers. But I did quit.

By Mr. Kusworm to Respondent:

Q. You did what?

A. I was through.

Q. And how long ago was this?

A. I told you I had it figured about two months.

Q. Since you quit how long?

A. (Note: Discussion here. No definite answer given.)

By Mr. Brown to Respondent:

Q. You have stated that you carried on this arrangement with Mr. Wally sending men to you for a period of about eight weeks. Is that correct?

A. Yes.

Q. And would you state approximately when was the last time that he sent a man to you for purposes of prostitution?

A. Four years.

Q. About four years ago, is that right?

[fol. 49] A. Four or five years ago.

Q. And where were you living at that time, Mrs. Woodby?

A. Summit Court.

Q. When did you leave Summit Court?

A. About five years.

Q. And did you leave Summit Court shortly after you ceased having these relations?

A. Yes.

Q. And you stated earlier I believe that Mr. Wally threatened you and was reporting you . . .

A. Correct.

Q. . . . to these other authorities. I note in your statement here on Page 15 of Exhibit 2, these questions, two questions that I'd like for you to explain, if you will please. Question: "Did Mr. Wally attempt to get you to continue this arrangement after that time?" "Yes." "Did he threaten you in any way?" The answer is, "Not direct." "In what way did he threaten you?" Answer: "First he said he would report me." Question: "To whom did he threaten to report you to?" Answer: "I guess the police." Is that correct?

A. To the immigration men. He knew that I wasn't an American citizen.

Q. When you first met him, you have indicated that he took pictures of you.

A. Yes, that's correct.

Q. Were these pictures that if they were shown to somebody else would cause you embarrassment?

A. I think so.

Q. Were they pictures that were posed without clothing?
[fol. 50] A. That's correct.

Q. And was that the only time that you ever took such pictures?

A. The only time.

Q. Was that the only time you ever posed for such pictures?

A. Correct.

Mr. Brown: Now, you've mentioned the children and I believe, Mr. Special Inquiry Officer, that the facts relating to these children are all in this Exhibit 2. If the special inquiry officer desires to let me, to ask questions concerning these children at this time, their whereabouts and so on. If not, they are in Exhibit 2 for his consideration.

The Special Inquiry Officer: Well, suppose that the special inquiry officer now reads this exhibit.

Mr. Brown: Very well.

The Special Inquiry Officer: I won't be the only one in the room who is unfamiliar with this exhibit, then. We'll recess.

Hearing Recessed.

Hearing Reconvened.

Mr. Brown: If you want me to question the respondent concerning her children. Having read the statement, do you desire any questions at this time from the examining officer, Mr. Lott?

The Special Inquiry Officer: I don't think so.

[fol. 51] Mr. Brown: At this time, Mr. Lott, I should like to conclude any questioning on behalf of the Government, but of course subject to any further inquiry.

The Special Inquiry Officer: Do you have anything further to submit at this time, Mr. Brown?

Mr. Brown: I have one witness that has been subpoenaed by the Government today that I should like to present.

The Special Inquiry Officer: You may proceed.

ANTHONY AMICON introduced as a witness for the Government:

By Special Inquiry Officer to Witness:

Q. Will the witness stand and raise his right hand, please? Do you solemnly swear that all the testimony that you shall give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. You may be seated. Will you state your name, please?

A. Anthony Amicon.

The Special Inquiry Officer: You may proceed, Mr. Brown.

By Mr. Brown:

Q. Mr. Amicon, where do you live?

A. 323 Fountain Avenue, Dayton, Ohio.

Q. Are you a native-born citizen of the United States?

A. Yes, sir.

Q. I believe, Mr. Amicon, that you appeared at this office [fol. 52] on November the 15th, 1961. At that time you made a statement in the case of the respondent, Elizabeth Woodby, before Investigator Larry J. Porter and I have a transcript of that statement that I would like to show you at this time and ask you to examine it with counsel. Mr. Amicon, having read this record of sworn statement, do you now state that these answers that you gave to the questions therein are true and correct as they stand?

A. To the best of my knowledge, yes, sir.

Q. Mr. Amicon, I would like to question you concerning the first part of this statement taken from you here.

Mr. Myers to the Special Inquiry Officer: May I make an objection in the record to that one question, or will you withdraw that one question?

Mr. Brown: I haven't made any offer on it yet.

Mr. Myers: Oh, no offer? All right.

By Mr. Brown:

Q. Mr. Amicon, when did you meet Mrs. Woodby, approximately when?

A. 1957, approximately I think around October.

Q. You stated in this statement that you met her at the place where she works, Neil's Restaurant.

A. Yes, sir.

Q. Furthermore, that she was employed there as a waitress, is that correct?

A. Yes, sir.

Q. It is noted that you stated that the manner in which you met her was you went there with a friend to eat and the friend knew her and told you about her and he introduced you to her.

A. Yes, sir.

Q. And that before he introduced her to you, he told you that she was "in the business" and in answer to the question, "What do you mean in the business," your answer is, "That you could pay for companionship or sexual intercourse or what have you." Is that correct?

A. I retract part of that, if I may. I mean, actually what has come to my mind since that time. I was separated from my wife and living with this friend and he was eating up there all the time, so one evening I went up there to eat with him and seeing this good-looking girl why I commented and then I found out, then is when he told me, not prior to the time.

Q. You have indicated that you had visited her in her apartment after you had . . .

A. On her request.

Q. Since making this statement on November 15, 1961, have you changed your marital status in any way?

A. Yes, I had a divorce proceeding come up December the 8th which was prolonged now until May the 13th. April the 3rd is the—I have a reduction of payments coming up and get my final hearing for the divorce action in May. I

have all my papers set up and everything. It will be approximately April 23rd.

Q. When you went to see her you say in the statement that the problem of her needing money was discussed.

A. We discussed her childhood life, her life over here, and of course the financial problems that she was having, and had had, and so on.

Q. You stated that on the first occasional visit you gave [fol. 54] her \$10. Did you have sexual relations at time?

A. No, sir, I did not.

Transcriber's Note: Two questions and answers here are unintelligible.

Q. And what is your relationship with her now?

A. We're on very good terms.

Q. What?

A. On very good terms. I would like to marry this girl if I can get my divorce.

Q. Do you plan to marry her if you get a divorce?

A. I've given her a ring.

Mr. Brown to the Special Inquiry Officer: I would like Mr. Amicon's statement introduced, Mr. Special Inquiry Officer, into this proceeding and made a part of it.

The Special Inquiry Officer: Now, Mr. Myers, do you want to make a correction on this before I accept it?

Mr. Myers: Yes, sir. There is one question on the last page where the third to the last question on Page 7, where there was two questions asked in one sentence and there's a "no" answer. Mr. Amicon has stated to me and I think he should state for the record what he intended by this answer, so we know which part of the question this answer is referring to.

The Special Inquiry Officer: Do you wish to clarify that, Mr. . . .

By Mr. Brown:

Q. The question on which counsel for respondent asks for [fol. 55] clarification is, "To your knowledge, other than the

times you paid Mrs. Woodby when you first met her for her acts of prostitution, do you know of any other persons with whom she engaged in such acts?" The answer is, "No, sir." Now, to rephrase this question, did you pay Mrs. Woodby for acts of prostitution?

A. The answer to that is no.

Q. The second question is, do you know of any other persons with whom she engaged in such acts?

A. (unintelligible)

Q. Now you recall that at the first visit to her you stated that you gave her \$10, the first time you went up there. What was this for?

A. (unintelligible)

Q. But this \$10 that you paid her was not to practice prostitution, is that correct?

A. (unintelligible)

The Special Inquiry Officer: It will be received as Exhibit 3.

By Mr. Brown:

Q. Mr. Amicon, you have stated that you are still married.

A. Yes, sir.

Q. But that you have been separated from your wife. How long has it been since you have been separated?

A. Pretty near five years.

Q. Did the separation occur subsequent to the time that you met Mrs. Woodby or prior?

A. Prior. I was living with this person when I met her there.

[fol. 56] Q. The person who introduced you to the respondent, I believe Mr. Boling?

A. Boland.

Mr. Brown to the Special Inquiry Officer: I have no other questions of the witness or of the respondent and the Government has no other witnesses to present.

The Special Inquiry Officer: Does counsel wish to question the...

Mr. Kusworm: We have a few questions, if your honor pleases. We would like to ask Mrs. Woodby for clarification and also Mr. Amicon.

Mr. Myers to the Special Inquiry Officer: Shall I take Mr. Amicon first?

The Special Inquiry Officer: Yes, that's cross-examination.

By Mr. Myers:

Q. Mr. Amicon, you have stated that during a period of time after you met Mrs. Woodby that you gave her certain sums of money. Now, to clarify this, why did you give her sums of money?

A. The reason I gave her sums of money was on one occasion, it states in the record there, that she wanted to go down to pick up the children and at that time she didn't have the money to go. It would take almost a hundred dollars to make the trip to Harlan, Kentucky, pick up the children and bring them back.

Q. Did you ever pay Mrs. Woodby any money for any act of prostitution?

A. I never did, sir.

Q. This first \$10 that you gave her when you first went [fol. 57] to the girl's apartment, was there any sexual relations between you?

A. There were not any sexual relations between us two.

Q. And your relationship with Mrs. Woodby now is that you plan on marrying her at the termination of your present marriage?

A. You have the statement there from the time that I met her our friendship grew into love. I knew of her story. She told me about what had happened to her, what she had done, why she had done it, and that's how it ends up, with her and I becoming closer together.

Q. Have you...

A. (unintelligible)

Witness excused.

Mr. Myers: We will now have the testimony of Mrs. Woodby.

By Mr. Myers:

Q. Mrs. Woodby, you married your husband while he was stationed in Germany with the United States armed forces?

A. Yes, sir, I did.

Q. How long were you married before he came to the United States?

A. A year.

Q. Did you have a child at that time in Germany?

A. Yes, sir.

Q. And what was that child's name?

A. Gloria Elisabeth Woodby.

Q. He left Germany to come to the United States and you were there approximately a year . . .

A. A year and a half.

[fol. 58] Q. A year and a half. Now, where did you move to when you came to the United States?

A. We went to Kentucky with his parents.

Q. Was he supporting you while he remained in Germany?

A. No, sir, he did not.

Q. While you were in Germany did you engage in any acts of prostitution?

A. No.

Q. Had you ever engaged in any acts of prostitution up until the time of your marriage?

A. No, sir.

Q. When you came to the United States approximately a year and a half after he left, was that the date of your entry on February 7, 1956?

A. Correct.

Q. Did your husband meet you at New York at that time?

A. Yes, he did.

Q. And you had your child with you?

A. Yes.

Q. Where did you go from New York?

A. To Harlan, Kentucky.

Q. And who did you live with in Harlan, Kentucky?

A. With my in-laws, the mother and father and a sister.

Q. Your mother-in-law and your father-in-law and your sister-in-law and you and your husband and your child?

A. Yes.

Q. Were living in one house. How large was the house?

A. There's two bedrooms, a living room, and a kitchen there.

[fol. 59] Q. Did you and your husband and the child have one of the bedrooms?

A. Yes.

Q. Was your husband working during that period of time?

A. No, sir.

Q. How long did you live in Harlan, Kentucky after you arrived?

A. Six or seven months.

Q. And your husband never worked during that time?

A. No.

Q. Did he suggest that you leave Harlan, Kentucky, and go someplace else where you could find work?

A. No, he did not. I suggested it to him.

Q. You suggested it?

A. Yes, I was expecting my second child.

Q. At that time. When did you deliver your second child?

A. The 13th of August.

Q. What year? Well, you arrived in New York in 1956.

A. The same year.

Q. The same year? In August of 1956 you gave birth to what child?

A. Leonard Clarence.

Q. Now, at that time were you still living in Harlan, Kentucky?

A. No, because we had been here living with my other sister-in-law.

Q. With your husband's sister?

A. Yes.

Q. How long had you been living in Dayton, Ohio, at that time?

A. We was moving in an apartment a month before the child was born.

Q. Well, how long had you been in Dayton?

[fol. 60] A. We moved from one sister to another sister-in-law.

By Mr. Kusworm:

Q. A short time?

A. A short time.

By Mr. Myers:

Q. All right. Now, when you lived with your sister-in-law at Fairborn, was your husband looking for a job?

A. Yes, he was.

Q. Did he ever find a job?

A. No, he did not.

Q. And approximately how long did you live with that sister-in-law?

A. Through the childbirth it was.

Q. And then you moved into an apartment?

A. Yes.

Q. And where was that apartment?

A. 528 Notre Dame.

Q. Now, when you were at 528 Notre Dame, was your husband still looking for a job?

A. He just find a job before. I get him the job.

Q. You got him the job?

A. Yes. I had to go to the doctor and my sister was taking me to a German doctor. I could not speak English good and I was taken to the German doctor, and I told him

my problem and when I come over here and he says he could get a job for my husband.

Q. I see. Now, how long did you live at 528 Notre Dame?

A. About four months.

[fol. 61] Q. Four months? And then why did you leave there?

A. I left. As soon as the child was born, the second, my husband took my little girl to Kentucky. When I came out of the hospital I didn't have no job there and the son was injured and still in the hospital, too. At that time my husband worked in a filling station, but he come home about some three or four o'clock in the morning. I didn't know where he was or what he was doing until he gets a registered letter and I asked him for this letter because I decided that I wanted to see it. And he didn't show me the letter, burned it. I don't know where the letter come from. Anyway, we get an argument and I wanted to leave him and the little boy was just come out of the hospital and he said to me, "If you travel, you'll travel without the child" I didn't want to get in any trouble because of me not being a citizen. I'd better let the child go. So, I did. He give me ten dollars and he put me on the bus to go to Pennsylvania to my girl friend what I know from Germany. I went down there, but I returned the next day. The day I come back the child was gone and the apartment was empty. I didn't have no money.

Q. What did you do then?

A. I meet a girl.

Q. Then your husband forced you onto the bus almost at gun point?

A. Yes, he give me ten dollars and put me on the bus.

Q. And put you on the bus with ten dollars and sent you to Pennsylvania to your girl friend's house. And when you got to Pennsylvania you wanted to come back to your little child?

A. Yes.

Q. Did you have any money so you could come back?

[fol. 62] A. My girl friend gives me the money to come back.

Q. She gave you bus money to come back?

A. Yes.

Q. And you came back to Dayton, Ohio, the next day?

A. That's right.

Q. And you went to your apartment on Notre Dame?

A. Yes.

Q. And your husband was gone?

A. Yes, and the children.

Q. Both children were gone, too?

A. The first child was in Kentucky already. (unintelligible sentence)

Q. I see. Your daughter was in Kentucky when you went to the hospital, and you didn't have anybody to stay with the child.

A. That's right.

Q. I see. So you came back to the apartment and he was gone, your child was gone, and everything else was gone.

A. I come back from Pennsylvania because the baby was sick with the flu.

Q. Were you sick at that time?

A. Yes, I was sick, too.

Q. What was wrong with you?

A. I guess it was the aftereffects. I was going back to working and keeping house and everything and I wasn't feeling good. Then the boy was sick and I couldn't take him on the bus. I went to Pennsylvania, but I returned the next day because I know the boy wasn't well, but he was gone, his clothes and everything wasn't there.

Q. Well, where did you live then, when you came back to the apartment?

[fol. 63] A. I stayed in an apartment until I find a job.

Q. Where, in the same apartment on Notre Dame?

A. Yes.

Q. This was a furnished apartment then?

A. Yes.

Q. And where did you find a job?

A. At McCrory's, the five and ten cent store down town.

Q. All right. How long did you work in McCrory's?

A. Three months.

Q. And then where did you go?

A. Then I find a job where I am still working now.

Q. At Neil's?

A. Neil's Restaurant.

Q. Now, what happened this one day when you received a phone call from your husband? This happened right after you went to work for Neil's?

A. Yes.

Q. All right. And you were living on Orchard?

A. No, I was living on—this time I had a phone call from my husband I was living at Summit Court. Right behind the place I'm working.

Q. I see and you received a phone call from your husband and what did your husband say?

A. He called me and he told me that the boy gets in the hospital and that he don't have any insurance or Blue Cross to pay the hospitalization and the boy needs operation and they won't do it if he's not paying for it and he did not work as I told you and he asked me to send him the money. I asked him how much he needed. And he said \$300. And I [fol. 64] told him I don't have the money and I had not been too good to anybody to ask them for the money. And I just a short time work for my employer and of course (coughing here), but within this time before I got this call I had found a job at McCrory's; I went down to Kentucky...

Mr. Kusworm: Talk to the judge so he can—he wants to hear you.

By Respondent:

A. ... and brought my little girl with me back to Dayton. She wasn't living with me at the time, see, my husband called me and told me that he needs the money for this operation.

By Mr. Myers:

Q. Did he tell you what kind of an operation the child needed?

A. No, he did not.

Q. Did he say it was a serious operation?

A. He said it was serious, something about a head injury or something.

Q. So you were put in fear ...

A. Yes.

Q. ... at the time, that the child needed an operation and you didn't have any money for the operation. Did you fear that the child might die if he didn't have an operation?

A. Yes, I did because I know if I don't help, my husband don't do it because he doesn't have a job and my in-laws don't have no money to pay for it.

Q. So you knew that if you didn't get the money for this child there would be no way that the child could get an operation and therefore it might die?

A. That's correct.

[fol. 65] Q. And this, at that time, was your sole worry, how to get this money to your child?

The Special Inquiry Officer: Mr. Myers, these questions are tremendously leading. I'd like to hear her story in her own words, rather than yours.

Mr. Myers: All right. Excuse me. I'm getting carried away because I've gone over it so much, your honor.

By Mr. Myers:

Q. All right, let me go back then, Mrs. Woodby. What was your feeling when you received the phone call from your husband? You already stated that you knew your husband didn't have any money and he wasn't working and you already stated that your in-laws didn't have any money. Now, tell the court what your feeling was, this is very important.

A. I was working part time, I was working from nine o'clock to 1:30 in the afternoon and then went back to work at five till 2:30 in the morning, and I had my little girl with me as I told you. Yeah, I did get a phone call from my husband and he told me that the boy's very sick and that he needs operation, but he can't pay for it, he didn't have no insurance and if I'm a mother now, to get it. And I told him, "I don't have that much to give to you." He says, "If you are mother enough, you know how to get it, if you care enough for the child." I told him I'd try.

By Special Inquiry Officer:

Q. Let me interrupt you. You said, if you are mother enough you would know how to get the money?

A. Yes. It was on the next day (unintelligible).

[fol. 66] By Mr. Myers:

Q. What was your feeling—I mean, what did you feel if you didn't get the money, about your child?

A. I would have done anything for this child.

Q. Did you feel that the child might die?

A. Yes, because as I told you I knew he wasn't very well.

Q. All right. Now, that was one day. When did Tom Wally come into the picture?

A. It was right the next day after I talked to my husband on the phone the day before.

Q. All right, and then what happened?

A. Mr. Wally come to the door and knocked on the door and I opened it. I was crying and he said to me then, "I would like to demonstrate a sweeper," and I told him, I said, "Look, in the first place I could not afford a sweeper and in the second place I have other things on my mind to do much more than buying a sweeper." And he told me, "What are you troubled about?" And I guess—I told you I was alone. He was a stranger, but some times you have to talk to somebody, so I told him. He told me, he says, "How fast do you need the money?" I said, "I need it in

a couple of days." He says, "Well," he says, "I'll be right back, then we can talk about it much better." He went outside and come in with a fifth.

By Mr. Kusworm:

Q. A what?

A. A bottle.

Q. Of what?

A. Of whiskey. I was not drinking at this time and it hit me pretty fast.

[fol. 67] By Special Inquiry Officer:

Q. You said it hit you pretty fast?

A. The drink. So he told me how I could make the money, how he's going to help me and he's going to give me \$300 now if I work for him. I did not want to do it, but I was thinking about the child I had nicknamed and the child's in the hospital, so I did it. He says, "I put you on," he says, "three months." But I was not planning on it and I did not do it for a living because I work all my life, but I needed that money at that time. As fast as I get it I quit and I told him so.

By Mr. Myers:

Q. Mrs. Woodby, did you work until you got the \$300, is that right?

A. That's right. Until I paid him the \$300 what he give me.

Q. You paid him back his \$300 and as soon as you paid him back that \$300 did you quit?

A. Yes.

Q. Mrs. Woodby, to continue now, you stated that you paid Tom Wally back the \$300. Now, when you paid him back did you stop all that prostitution?

A. Yes, I did.

Q. And how long ago was that?

A. Four or five years.

Q. Did Mr. Wally approach you after that time to perform other acts for him?

A. Yes, he tried.

Q. And what was your answer to him?

A. No.

Q. Now, since that time, which you said was approximately four or five years ago, you were living at that time on Summit?

[fol. 68] A. Yes.

Q. Now, did you move at that time or approximately at that time?

A. Yes, I went down to Knoxville, Kentucky.

Q. Knoxville, Kentucky, or Tennessee?

A. Tennessee.

Q. All right. And how long did you stay at Knoxville, Tennessee?

A. Three months.

Q. And what were you doing there?

A. I was working in the dining room as a waitress in the Brown Derby.

Q. Is that a restaurant?

A. Yes.

Q. Do they serve liquor there?

A. No, just beer. It's dry.

Q. Now, did you ever engage in any acts of prostitution while living at Knoxville, Tennessee?

A. No, I did not.

Q. When you decided not to stay at Knoxville, Tennessee, any more, how did you come back to Dayton?

A. Mrs. Jackson. I called her to come down and pick me up. She come down and picked me up.

Q. What is her first name?

A. Arlene.

Q. Now, approximately what was the date of this that she came to pick you up?

A. It was the 4th of July.

Q. In what year?

By Mr. Kusworm:

[fol. 69] Q. Well, about how many years ago was it that you were in Knoxville?

A. '57 or '58, I guess.

By Mr. Myers:

Q. All right. Now, Mrs. Jackson brought you back and who did you go to live with at that time?

A. I stayed with her two weeks on Rugby. I live with her and with her daughter and son.

Q. And how long did you live there?

A. I lived other there for two weeks. Then she moved.

Q. Two weeks?

A. Two weeks, yes. Then her and me and her son moved up in an apartment right above the place I'm working.

Q. And from the time that she came to pick you up in Knoxville, Tennessee, how long did you live with Mrs. Jackson?

A. About a year.

Q. About one year?

A. Yes.

Q. And then did she move out or did you move out?

A. She gets married and she moves out.

Q. Did you ever live with her and her husband?

A. Yes, at 9th and Cumberland.

Q. Then you lived with her more than a year?

A. No, just her and me was living together and her son.

Q. All right. Well, after she got married how long did you live with her and her husband?

A. Oh, I would say about two weeks.

[fol. 70] Q. Two weeks? I see, and have you been living alone since that time?

A. Yes.

Q. Where have you been living?

A. 940 Old Orchard.

Q. Since that time, Mrs. Woodby, have you ever engaged in any acts of prostitution?

A. No, sir.

Q. Mrs. Woodby, would you have engaged in any acts of prostitution had you not received the demand from your husband for the \$300?

A. No, I would never have done it.

Q. Had you ever thought about it before?

A. No, never.

Q. What about since?

A. Never.

The Special Inquiry Officer: Do you have any cross-examination?

Mr. Brown: Yes, please.

The Special Inquiry Officer: Very well.

By Mr. Brown:

Q. When you went to Pennsylvania how old was your child?

A. Four months, premature baby.

Q. Four months? And he was a premature baby?

A. Yes.

Q. So you left him and went to Pennsylvania?

[fol. 71] A. I didn't want to leave him. But he give me the money for it because as I told you we get in an argument. I wanted to take the child with me. He won't give him to me.

Q. How old were they (unintelligible)

A. (unintelligible)

Q. I'd like the respondent to answer, please. You said last year?

A. Yes.

Q. Are these children in the custody of someone else?

A. They are staying with my in-laws, my mother and father-in-law. I'm trying to get a custody of them.

Q. Was the custody of these children awarded to your father-in-law and mother-in-law by the court?

A. Temporary.

Q. Temporarily?

A. Yes.

Q. Do you have any action pending in a court anywhere now concerning the custody of these children?

A. Yes.

Q. Have you contributed anything to their support in the last twelve months?

A. I have offered to support them, but they won't let me.

Q. Did you send them money in, say, the last twelve months?

A. Oh, I would send them money for birthday and clothes.

Q. How long have your in-laws had the custody of the children?

A. Since when my husband died, which was two years ago.

Q. Have they been supporting them?

A. Yes. I tried to get a . . . but they won't let me. They [fol. 72] wouldn't let me give the children nothing. They won't even let me have the children on school vacation or Christmas time. That's why I put it in court, because I want the custody of the children.

Q. Where is this action pending in court for the custody of the children?

A. In Harlan, Kentucky.

Q. In Harlan, Kentucky?

A. Yes.

Mr. Brown: That's all.

Mr. Kusworm to the Special Inquiry Officer: I'd just like to ask this question.

By Mr. Kusworm:

Q. Tell the court whether or not you received a letter from your in-laws telling you if you came down to see your children they would have you locked up?

A. Yes, that's true. I still got it. I can prove that.

Q. You what?

A. I still got their letter and I can prove that.

Q. Have you got the letter with you?

A. No, I don't.

Q. All right. Now, one more question. Isn't it a fact that you have hired a lawyer in Dayton to try to get your children for you and that proceedings are now pending to get them?

A. That's true.

Q. What's the name of the lawyer?

A. James E. Bruck.

[fol. 73] By Mr. Myers:

Q. He's an attorney in Harlan, Kentucky?

A. Yes.

Q. And that's where the action is pending?

A. Yes.

Mr. Kusworm: That's all.

ARLENE JACKSON introduced as a witness for the respondent:

The Special Inquiry Officer:

Q. Will the witness please rise and raise her right hand? Do you solemnly swear that all the testimony that you shall give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. You may be seated. Will you tell us your name, please?

A. Arlene Jackson.

Q. And where do you live?

A. 4053 Bayonne.

Mr. Kusworm: Bayonne Avenue, Dayton, Ohio. Talk a little louder.

The Special Inquiry Officer:

Q. How old are you?

A. Forty-two.

The Special Inquiry Officer: You may examine the witness.

By Mr. Myers:

Q. Mrs. Jackson, Mrs. Woodby testified that she called [fol. 74] you from Knoxville, Tennessee, to come down and pick her up. Now, will you tell us what transpired from that point on?

Mr. Kusworm: Talk loud and talk to the court.

The Witness: She called me and told me that she wanted to get back to Dayton and she didn't have any money and so I had a friend of mine take the car and we went down to get her. We brought her back here and she stayed with me.

By Mr. Myers:

Q. Where was that?

A. On Rugby Road, 1936 Rugby Road.

Q. Now, how long did you live on Rugby Road?

A. That was July the 4th and we moved from there in September.

Q. To where?

A. We lived at 1500 West Riverview.

Q. Is that the apartment above Neil's?

A. Right.

Q. How long did you live together there?

A. We lived there until between New Year's—Christmas and New Year's, that would be 1958.

Q. All in all, how long did Mrs. Woodby live with you in the different . . . starting from July the 4th?

A. Well, she lived with me from then up to '61, I imagine about February.

Q. That's a period of about two and a half years?

A. That's right.

Q. During this period of time, were the two of you close? [fol. 75] A. Yes, very close.

Q. Did she come home immediately after work?

A. That's right. Yes, she did.

Q. Were you with her almost all of the time other than when you were working?

A. Most of the time.

Q. Did you ever see any men in the apartment?

A. No. Occasionally a date. Very, very seldom. There was no men in the daytime at all and when there was a date it was with me.

Q. When she went on a date you went with her?

By Special Inquiry Officer:

Q. What's your answer?

Mr. Myers: Either yes or no.

Mr. Kusworm: Talk so the judge can hear you. Talk loud. Talk so the microphone can pick you up.

The Witness: Well, what was the question?

By Mr. Myers:

Q. The question was, when Mrs. Woodby went on a date did you also go along?

A. Yes, I did.

Q. Would you have noticed if Mrs. Woodby had gone out to see men?

A. I would have known.

Q. Did she?

A. No.

[fol. 76] Q. Are you sure, as long as you lived with her that Mrs. Woodby was not entertaining any men?

A. No, she wasn't. Not to my knowledge.

Q. What is Mrs. Woodby's reputation?

A. I think it's very good.

Q. What do people think of her?

A. Most of them think she's very good as far as I know.

Q. Do you know the same general group of people that she knows?

A. Yes.

Q. And she is not considered a prostitute?

A. No.

Q. Have you ever heard anybody refer to her as that?

A. Not that I can recall.

Q. Would you have permitted Mrs. Woodby to live with you if she had been anything other than a decent person?

A. No.

By Mr. Brown:

Q. (unintelligible)

A. No, I'm married.

Q. (unintelligible)

A. Not at the present time, no.

Q. Do you have any children?

A. Not by this marriage, but I have children.

Q. (unintelligible)

A. Yes, my son.

Q. How old was he?

[fol. 77] A. He was seventeen at the time.

Q. What kind of work do you do now?

A. Well, I do bookkeeping when I am working. I am not working at the present time.

Q. And have you ever been arrested?

A. No.

Mr. Brown: That's all.

The Special Inquiry Officer: You may be excused, Mrs. Jackson.

Witness excused.

JUANITA LEWIS introduced as a witness for the respondent:

By Special Inquiry Officer:

Q. Will the witness stand and raise her right hand, please? Do you solemnly swear that all the testimony that you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. You may be seated. Will you repeat your name, please?

A. Juanita Lewis.

Q. And how old are you?

A. I'm fifty-one.

Q. And where do you live?

A. At 4373 Macon Avenue, Dayton.

The Special Inquiry Officer: You may proceed.

By Mr. Myers:

[fol. 78] Q. Mrs. Lewis, how long have you known Mrs. Woodby?

A. I think for six years.

Q. Now, do you see Mrs. Woodby often?

A. Yes, I see her quite often.

Q. Have you visited in her home?

A. Yes, I have.

Q. Have you ever seen men in her home?

A. Never.

Q. What is her reputation?

A. Very good.

Q. What type of a housekeeper is she?

A. A very good housekeeper.

Q. What kind of a person is she?

A. Well, she is a very nice person as far as I know about her.

Q. Do you know the same people that she knows?

A. Well, I know Mrs. Jackson that she knows. When they lived together I would visit them frequently and on the average of once a week and they never knew when I was coming, and she was always as nice as she could be at any time that I have ever been there, that I was there, and I used to stay all night sometimes.

Q. And Mrs. Woodby was always there at night?

A. Sometimes she wouldn't be in from work yet, but then she'd always come in straight home from work and then she never went out.

Q. She used to work in the evenings?

A. Yes.

Q. And, as far as you know . . . (unintelligible)

[fol. 79] A. Good.

By Mr. Brown:

Q. (unintelligible)

A. Yes; I have.

Q. (unintelligible)

A. Well, when Arlene and her—Mrs. Jackson and her—lived together, I would visit there frequently and then where she works I go in and eat a lot.

Q. (unintelligible)

A. Yes.

Q. How often would you see her?

A. On the average of once a week I would say.

Q. In the last five years?

A. Well, when they lived together, when Mrs. Jackson and her lived together, I did.

Q. (unintelligible)

A. No.

Mr. Brown: That's all.

The Special Inquiry Officer: You may be excused.

Witness excused.

The Special Inquiry Officer: The only application here is for termination of the proceedings?

Mr. Kusworm: Yes.

[fol. 80] The Special Inquiry Officer: If she should be found deportable does she wish to apply for all she would be eligible for?

Mr. Kusworm: No, termination is the only application.

By the Special Inquiry Officer:

Q. Mrs. Woodby, don't judge by what I am about to ask you that I have decided this case. Every alien in deportation proceedings may name one country to which she would prefer to be sent if she has to be deported. What country would you name?

A. Germany.

Q. And do you have any reason to fear that you would be subject to physical persecution if you were sent to Germany?

A. I don't know.

Q. Well, have you any reason to expect you would have any trouble in Germany?

A. No.

The Special Inquiry Officer: Counsel, if the decision is adverse, you have the right of appeal to the Board of Immigration Appeals.

Mr. Kusworm: We are going to take every step that is possible under the law to keep this woman in this country.

The Special Inquiry Officer: And such appeal must be taken within ten days from the date of the mailing of the decision.

[fol. 81] Mr. Kusworm: Suppose we don't get it? Now, if you sent it by registered mail there is no question about it, but you may not get it. The United States mail is not infallible, you know.

The Special Inquiry Officer: Well, I'm sorry. Our regulations so prescribe, ten days from the mailing, and if the decision is favorable, the district director has the same right of appeal. The hearing is closed subject to the stipulation that counsel is permitted to attempt to supply affidavits . . .

Mr. Kusworm: Of the employer.

The Special Inquiry Officer: . . . to be referred to the examining officer and there is no objection on the record.

Hearing closed.

[fol. 82]

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A10 331 472—Cleveland, Ohio

IN DEPORTATION PROCEEDINGS

In the Matter ofELIZABETH ROSALIA WOODBY, Respondent.

Charge:

I & N Act—Section 241(a)(12), prostitution after entry
[8 U.S.C. 1251(a)(12)]

Application: Termination of proceedings

In Behalf of Respondent:

Sidney K. Kusworm, Sr., Esquire
Jacob A. Myers, Esquire
403 Keith Building
Dayton, Ohio

In Behalf of Service:

W. Nelson Brown
Examining Officer
Cincinnati, OhioDECISION OF THE SPECIAL INQUIRY OFFICER—
October 30, 1962

Respondent is a female, 30 years old, a widow and the mother of two United States citizen children who at the time of the hearing were in the legal custody of her father- and mother-in-law. She is an alien, a native of Hungary and a citizen of Germany, whose only entry into the United States was on or about February 7, 1956, at New York, New York.

The order to show cause contains the allegation, "You have engaged in prostitution after entry," and charges her with [fol. 83] deportability pursuant to section 241(a)(12) of the Immigration and Nationality Act [8 U.S.C. 1251(a)(12)],

in that by reason of conduct, behavior or activity at any time after entry she became a member of any of the classes specified in section 212(a)(12), to wit, aliens who have engaged in prostitution.

Respondent admits she engaged in prostitution after entry, but claims it was in circumstances of economic and emotional duress occasioned by news that her infant son needed hospitalization which would cost \$300, a sum which a procurer, a stranger to her, agreed to advance to her to be repaid from money she would receive from men he would send to her.

The respondent came to Germany from Hungary in 1945 as a displaced person. On January 8, 1955, she married a United States citizen serving in the United States armed forces in Germany. Their first child, a girl, was born in Germany. After respondent's arrival in the United States in February of 1956 she and her husband and daughter lived with her husband's parents in Harlan, Kentucky, for a few months, then came to Dayton, Ohio, where her son was born on August 13, 1956. As prematurely born, the infant remained in the hospital for three or four months. Respondent testifies that when the baby was released from the hospital, she and her husband quarreled and her husband virtually forced her to visit a friend in Pennsylvania. She returned after one day to find that her husband had taken the baby and left for Harlan, where her daughter already was. This would have been in late 1956.

About four months later, according to respondent, she had a telephone call from her husband telling her that the baby [fol. 84] had to be hospitalized and that \$300 was needed at once and that she was the only one in the family who could raise that sum. The next evening, so her story goes, she was alone in her apartment, crying, when a vacuum cleaner salesman called. She told him of her troubles and that since she had just taken a job as a waitress she knew no one from whom she could borrow the money. The salesman said he

might be able to help her. He left the apartment and soon returned with a bottle of whiskey and another man. After a few drinks around the salesman offered to advance the money, to be repaid, as aforesaid, from what she received from men he would send to her. As a waitress she was free afternoons to accept dates. Respondent agreeing, the salesman and the man with him then took some photographs of respondent in the nude, she had the \$300 the next day and received her first customers. Respondent testifies she continued receiving men in prostitution for about eight weeks until she was able to repay the salesman. She then wanted to quit but the salesman threatened to report her to the police or the immigration authorities, and she did continue for another two weeks after these threats, and then she met Mr. Amicon and quit prostitution (H.R. 13, Ex. 2, p. 16).

The only precedent decision of the Board of Immigration Appeals involving prostitution committed under duress is *Matter of M—*, 7, I. & N. Dec. 251 (1956). The alien there was a girl of 17, an orphan, whom two women transported from one Mexican city to another on promises of employment as a waitress at higher wages. Instead she was forced into a house of prostitution and told that she would have to remain until her transportation costs of a thousand pesos [fol. 85] were repaid. On several occasions she attempted unsuccessfully to escape. The Board stated as follows: "As a matter of law she is not excludable as a prostitute under section 212(a)(12) of the Immigration and Nationality Act of 1952, because those to whom respondent was indebted reduced her to such a state of mind that she was actually prevented from exercising her free will through the use of wrongful, oppressive threats or unlawful means [footnote omitted]."

No threats or unlawful means accompanied the salesman's proposition to Mrs. Woodby. If her story is believed, anxiety for her child made the proposition acceptable and she voluntarily accepted it, though in less pressing cir-

cumstances she would have rejected it. If it is argued that the salesman used liquor to influence respondent's initial decision, there was opportunity the following day to repent and reject the proposal.

If as a matter of law the story she tells should make the defense of duress available, a careful study of the record discredits that story. The chronology of events is decisive. The first clear date is August 13, 1956, when her son was born. About four months later the son was released from the hospital and her husband left her, taking the infant with him. This would have been about December, 1956. The son's later need for hospitalization came when he was six to eight months old, and when respondent was living in Summit Court, Dayton (Ex. 2, p. 10). At the latest, this would have been April, 1957, when respondent admittedly began practicing prostitution. The date is further fixed by respondent's testimony that after her husband left her she [fol. 86] found a job at McCrory's, which she held for three months before commencing at Neil's Restaurant. It was shortly after she started work at Neil's that she received the telephone call about her son (H.R. 29).

As before indicated, it was when she met Mr. Amicon that she quit prostitution. At the hearing, Mr. Amicon testified he met respondent around October, 1957 (H.R. 18). If Mr. Amicon correctly fixed the month and year, respondent had by then been prostituting since April, or about six months, rather than the approximate two months she admits to in which she raised the \$300 to repay the vacuum cleaner salesman. From the record, however, it appears that the year in which she met Amicon was 1958 rather than 1957. Amicon testified that when he first met respondent she was living at 1500 Riverview in an apartment above Neil's (Ex. 3, p. 3). From respondent's testimony and that of her witness, Mrs. Jackson, it develops that respondent did not move to the apartment at 1500 Riverview above Neil's until late 1958. When respondent left Summit Court she went to Knoxville, Tennessee, where she stayed three months

(H.R. 33, 34). She had moved to Summit Court about two months after her husband left her, or about February of 1957 and resided there about a year or longer, or until February, 1958, or later (Ex. 2, pp. 3, 4). She left Summit Court when its management learned, according to respondent, that one of the vacuum cleaner salesman's girls, who was sharing respondent's residence there, was practicing prostitution, and told her to leave (Ex. 2, p. 21). Respondent returned from Knoxville on July 4, 1958, when her friend Mrs. Jackson came from Dayton to get her. She then shared an apartment on Rugby Road until September, 1958, when they moved to 1500 West Riverview, the apartment over Neil's Restaurant (H.R. 40). This was the apartment to which she took Mr. Amicon when she was introduced to him as a prostitute. Respondent and Mrs. Jackson lived [fol. 87] together until about February, 1961, or a period of about two and a half years, according to the testimony of respondent's witness, Mrs. Jackson (H.R. 40). These dates, supplied variously by respondent, Mrs. Jackson and Mr. Amicon and mutually corroborated in one detail or another, demonstrate that respondent commenced practicing prostitution about February of 1957, whatever the reason or provocation may have been, and continued until late 1958, long after she had repaid the salesman's loan, if her story about the loan be believed. Parenthetically, it is a hard story to believe.

I find the fourth allegation of the order to show cause sustained by the respondent's testimony, that of her witness Mrs. Jackson, and that of the man who testified he hoped to marry her. There are other indications in the record that respondent may have been engaged in prostitution before the time she admits she did and after the time she claims to have stopped. They are corroborative, but need not be detailed.

The respondent, through counsel, has made application only for termination of proceedings. On the record of this proceeding and the charged ground of deportation, the only

eligibility for relief from deportation would be an application for adjustment of status under section 245 of the Act [8 U.S.C. 1255] and waiver of inadmissibility under section 212(g) [8 U.S.C. 1182(g)]. Since her citizen children are now in the legal custody of respondent father-and mother-in-law, there is no basis for considering that her deportation would result in extreme hardship to her children. The custody of the grand-parents was at the time of hearing of two years' duration. At the present writing [fol. 88] there is no indication that respondent has received the custody of the children, although at the hearing she testified she had engaged a lawyer for proceedings to regain their custody.

Respondent has designated Germany as the country of her deportation. Should Germany not accept her, the special inquiry officer specifies Hungary as the country of deportation, that being the country of her birth.

Order: It Is Ordered that the respondent be deported from the United States to Germany on the charge contained in the Order to Show Cause.

It Is Further Ordered that if the aforementioned country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to Hungary.

Richard P. Lott, Special Inquiry Officer.

[fol. 89]

**NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS
DEPARTMENT OF JUSTICE, WASHINGTON, D.C.**

—Filed November 13, 1962

Submit in Triplicate to:

**Immigration and Naturalization Service, 600 Standard
Building, Cleveland 13, Ohio.**

File No.: A10 331 472 SIU

Date: November 9, 1962

**In the Matter of
of**

ELIZABETH ROSALIA WOODBY

**I hereby appeal from the decision in the above entitled
case dated October 30, 1962.**

**If this is a Deportation Proceeding, you must furnish the
information requested on the reverse of this form or your
appeal may be rejected.**

**I am not filing herewith written brief or other statement
for consideration by the Board of Immigration Appeals.
(A supporting brief is not required, but if filed is to be sub-
mitted in triplicate to the same office where this notice of
appeal is filed.), but one will be filed within three weeks.**

**I do desire oral argument before the Board of Immigra-
tion Appeals in Washington, D. C.**

**Note: Oral argument in any one case should not extend be-
yond fifteen (15) minutes, unless arrangements are
made in advance of the hearing for additional time.**

**An appellant will not be released from detention or
permitted to enter the United States to present oral
argument to the Board but may make arrangements
to have someone represent him before the Board.
Unless such arrangements are made at the time the**

appeal is taken, the Board of Immigration Appeals will not calendar the case for argument.

Sidney K. Kusworm, 402 Keith Bldg., Dayton 2, Ohio.

Fee.—Be sure to enclose the required fee, specified in attached letter. Attach money order or check. Do Not send cash. Remittances should be made payable to the "Immigration and Naturalization Service, Department of Justice." If this form is filed in Guam, make remittance payable to "Treasurer, Guam"; if filed in the Virgin Islands, make remittance payable to "Commissioner of Finance of the Virgin Islands." The fee is required for filing the appeal and is not returnable regardless of the action taken thereon.

[fol. 90]

This Side Must be Executed in All Appeals in Deportation Proceedings

- | | | |
|--|---------------|---------------|
| 1. Are you contesting deportability? | <u> x </u> | <u> </u> |
| | Yes | No |
| 2. Are you appealing from denial of voluntary departure? | <u> </u> | <u> x </u> |
| | Yes | No |
| 3. Are you appealing from denial of an application for creation of the status of an alien lawfully admitted for permanent residence under section 244(a) <input type="checkbox"/> , 245 <input type="checkbox"/> , or 249 <input type="checkbox"/> of the Immigration and Nationality Act? | <u> </u> | <u> x </u> |
| | Yes | No |
| 4. Are you appealing from denial of an application for temporary withholding of deportation based upon a claim of physical persecution under section 243(h)? | <u> </u> | <u> x </u> |
| | Yes | No |

If the answer is "Yes" to any of the above questions, or if you have any other grounds for appeal, state briefly the reasons supporting your contentions.

We claim that the defense of duress is applicable in this case. The findings of fact and law of the hearing officer are against the weight of the evidence and contrary to law.

Elizabeth Rosalia Woodby did not get a fair hearing on this matter in that her attorneys were to receive a copy of the transcript and then have time to file a brief in this matter prior to the decision of the hearing officer.

They never received a copy of the transcript and therefore were not given the opportunity to file briefs as they were promised by the hearing officer and upon which promise they relied to the detriment of Elizabeth Rosalia Woodby. Elizabeth Rosalia Woodby has a valid defense, that defense being duress, which would have been developed fully in her briefs, had she been given the opportunity to file them.

[fol. 91]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
File A10 331 472
Deportation

In the Matter of
ELIZABETH ROSALIA WOODBY, Respondent.

BRIEF OF RESPONDENT

Kusworm and Kusworm, Attorneys at Law, By
Sidney G. Kusworm and Jacob A. Myers, Attor-
neys for Respondent.

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[fol. 93] Statement of Facts

The Respondent is a 30 year old female, who married an American soldier in Germany while he was stationed there. She gave birth to one child in Germany, and remained there for more than a year after her husband returned to the United States. She arrived in the United States in February of 1956, and she, her husband and their daughter lived with her husband's parents in Harlan, Kentucky. A few months later they moved to Dayton, Ohio where her son was born prematurely on August 13, 1956 (H. R. 25). At that time the Respondent, her husband and daughter lived at 528 Notre Dame, Dayton, Ohio, and lived at that address for approximately four months after the birth of the child (H. R. 26), this would have been approximately January 1, 1957. At that time the Respondent's husband virtually forced her to go to Pennsylvania to visit a friend. She returned the next day to find that her husband and the children had gone to Kentucky (H. R. 27). The Respondent went to work at McCrory's 5 & 10¢ store, and worked there approximately three months (H. R. 29). This would place the time at approximately April 1, 1957. The Respondent then went to work at Neil's Restaurant, and at the same time had moved her residence to Summit Court (H. R. 29). The Respondent received a telephone call from her husband, who was in Kentucky, stating that he needed \$300 for an operation for the baby. The baby was supposed to be in the hospital and the husband did not have any insurance or Blue Cross to pay the hospital, and they were not going to perform the operation unless they were paid the \$300 (H. R. 29), and she believed that the

[fol. 94] child would die if the operation were not performed.

The next day a vacuum cleaner salesman, by the name of Tom Walley, came to the door to sell the Respondent a vacuum cleaner, and she told him the story. He told her that he could help her get the money, since she knew no one else from whom she could borrow the money. He left the apartment and returned with a bottle of whiskey and another man. He took some pictures of her, and it appears as if men started coming to the apartment the next day (H. R. 7). These arrangements continued for approximately two months, until the Respondent had repaid the \$300 which she needed for the operation for her son (H. R. 8). When the Respondent attempted to cease the arrangement which she had, she was threatened by Walley with being reported to the immigration authorities and the police (H. R. 14 & 15). Even facing these threats of blackmail, the Respondent terminated this relationship with Mr. Walley, and moved to Knoxville, Tennessee to get away from Walley and remained there until July 4, 1957 (H. R. 34). A Mrs. Jackson drove to Knoxville to pick up the Respondent and brought her back to Dayton, Ohio, where the Respondent lived with Mrs. Jackson on Rugby Road. They lived there from July 4th until sometime in September, when they moved to 1500 W. Riverview, above Neil's Restaurant, where the Respondent was working (H. R. 40). Mr. Amicon met the Respondent at Neil's Restaurant in October 1957 where she was working (H. R. 18). Mr. Amicon was introduced at the restaurant to the Respondent as an alleged prostitute, but he found that she was not, and that she had ceased all such actions after she had repaid the money which she needed for her son's [fol. 95] operation. Amicon testified that he was willing to marry the Respondent (H. R. 20). Certainly, he would not propose marriage if he did not believe her story. (The Respondent has been a widow since July 14, 1957, when her husband was killed in an automobile accident).

The Special Inquiry Officers finding of fact is not supported by the record, in this case. On Page 5 of his decision, it is stated that Mr. Amicon stated that he met the Respondent in October of 1957. As a result of this meeting, the Hearing Officer erroneously found that the Respondent had been practicing prostitution since April or for approximately six months. In the record of the proceeding it is stated that the Respondent went to Knoxville, Tennessee for several months and remained there until July 4, 1957, and that she lived with a Mrs. Jackson, first on Rugby Road and then moved to above Neil's Restaurant in September of 1957. The Respondent met Mr. Amicon about one month later, as aforesaid. She stated in the record that she ceased practicing prostitution prior to her leaving for Knoxville, Tennessee. The entire time sequence is erroneously stated in the decision. The correct time sequence is as follows:

(1) The Respondent began the practice of prostitution approximately April 1, 1957 and engaged therein for approximately two months after which she quit being a prostitute.

(2) The Respondent traveled to Knoxville and returned therefrom no July 4, 1957.

[fol. 96] (3) The Respondent lived with Mrs. Jackson, first on Rugby Road and then at 1500 W. Riverview, above Neil's Restaurant from July 4, 1957, until October of 1957 when she met Mr. Amicon.

If the Hearing Officer had followed the time sequence in this matter correctly, as above set forth, then the factual basis for his decision is negated by the facts as they actually existed.

The above are the pertinent facts on which we base the law.

Law

[fol. 97] The Defense in this case is one of duress—if any acts were committed or performed by the Respondent,

she did so under duress and is therefore not legally responsible under the law.

The Respondent began practicing prostitution in approximately April of 1957, when she was informed by her husband that her son had a head injury, was in the hospital and needed an operation, but that he was not going to have this operation if the sum of \$300.00 was not first paid to the hospital and/or the Doctor. Respondent believed that if the operation were not performed, the child would die. The boy had been a premature baby and had been in the hospital approximately four months after his birth, and this phone call from the Respondent's husband came approximately four months after the child's release from the hospital. The father of the boy had no job, and, of course, was making no effort to procure the money which was needed. The father's character is portrayed quite vividly in the one incident where, after an argument, he placed the Respondent on a bus with \$10.00 to go to Pennsylvania to visit a friend, and then took the children to his parents house in Harlan, Kentucky.

When the Respondent received the phone call concerning the need for her son's operation, she was put in fear for the health and life of her son. She knew that the child would not get the operation if she did not provide the money for it. Not only was her husband not working, but her in-laws had no money either. The Respondent then entered into the practice of prostitution to raise the \$300.00 [fol. 98] which was demanded by her husband for the child's operation, and she ceased all acts of prostitution after she had this sum of money repaid to the lender under threat of blackmail.

The question involved in this case is therefore, were the acts of prostitution which were performed by the Respondent, performed under duress or not? We contend that they were and offer the following cases to support our contention.

There are many cases which give the definition of duress, but the first one which we will discuss is one which oc-

curred under similar circumstances, that being duress being used as defense for an order of deportation for the reason that the immigrant had allegedly engaged in prostitution. In the Matter of M—, 7 IN 251 (L.D. 804, 1956), an order of deportation was ordered by special inquiry officer finding that the immigrant had engaged in prostitution in violation of Section 241 (a) (1) of the Act of 1952.

While working at Magdalena, Sonora, Mexico as a waitress, she was induced by two women to go to Naco, Sonora, Mexico, on the promises that she would be given employment there as a waitress for higher wages than she was then receiving. She had not reached the age of eighteen years, but nevertheless was taken to a house of prostitution and told that she was to work as a prostitute and not as a waitress. She testified that she protested but was told that she owed them one thousand pesos for the expenses in bringing her from Magdalena to Naco, Sonora, Mexico, [fol. 99] and that she would have to repay this money before she could be released. She further testified that she attempted to escape from this house of prostitution on several occasions but was always located and forced to return to a house of prostitution in order to pay the money she owed. She finally met the man who is now her husband and claims that she has never since had illicit relations with any man. Respondent presented several letters attesting to her good moral character and her conducts since she has been married to her present husband. The special inquiry officer stated for the record that he believed that the respondent has testified truthfully and in all sincerity with regard to her experiences as a prostitute.

We have certainly considered all the evidence of record. The respondent has testified that she engaged in the practice of prostitution for a period of less than a year. There is always a showing that the respondent was indebted to the operator of the bawdy house to the extent of one thousand pesos and that she did not earn enough to pay for her meals, much less pay the debt. There was also a showing that at the first opportunity respondent, upon the assur-

ance of security through marriage fled those who had led her astray.

We are of the same opinion as the special inquiry officer that respondent has testified truthfully. *As a matter of law she is not excludable as a prostitute under section 212 (a) (12) of the Immigration and Nationality Act of 1952, because those to whom respondent was indebted reduced her to such a state of mind that she was actually prevented [fol. 100] from exercising her free will through the use of wrongful, apprisive threats or unlawful means.* (see *Weisert vs. Bramman*, 358 MO 636, 216 SW 2nd 430 (1948); *Walk-A-Show vs. Stanton*, 182 MC 405, 35 A 2nd 121 (1943); *Southern Railway Company vs. Stewart*, 115 F 2nd 317 (CCA 8, 1940). (emphasis added)

We had had occasion in the past to consider facts similar to those presented to the instant case and held that prostitution committed under duress would not support a charge laid under Section 241 (a) (1) of the Immigration and Nationality Act. See matter of R-H, A-1050 7646, BIA, December 28th, 1955, unreported. Accordingly we find the charges in the warrant of arrest not sustained. The proceedings will determinate it."

The respondent stated that she had been forced to practice prostitution and that her fall from grace was brought about by fraud, deceit, duress, and coercion practiced upon her and that she was unable to escape from this immoral life."

In the case *Weisert vs. Bramman*, 358 MO 636, 216 SW 2nd 430, (1948), duress was alleged by the Plaintiff when she executed a certain agreement with the Defendants. The Court stated "the modern rule of duress as established by the above cases is that "duress" is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim"; and that "the ultimate fact in issue is whether the alleged injured party was bereft of the free exercise of his willpower; and of which, the [fol. 101] means used to produce such state of mind, the

age, sex, capacity, situation, and relation of the parties, are all evidentiary."

Coleman vs. Crescent Insulated Wire and Cable Company, 350 MO 781, 168 SW 2nd, 1060, 1066. However, it is also the general rule that a claim of duress cannot be sustained where there is full knowledge of the facts of the situation and ample time and opportunity for full and free investigation, deliberation and reflection . . ."

In the case of *Walk-A-Show, Inc. vs. Stanton*, 182 MD 405, 35 A 2nd 121 (1943), the Court stated when confronted with the statement that a payment had been made to the city of Baltimore under duress, "duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of the party against whom it is brought."

The Court in the *Southern Railway Company vs. Stewart*, 115 F 2nd 317 (1940), at Page 321 stated: "There is no legal standard of resistance with which the victim must comply at the peril of being remedyless for a wrong done, and no general rule as to the sufficiency of facts to produce duress. The question in each case is whether the person so acted upon, by threats of the person claiming the benefit of the contract, was bereft of the quality of mind essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by the character of the threats, but rather by the effect produced thereby on the mind of the victim. The means used, the age, sex, state of health and mental characteristics of the victim are all evidentiary, but [fol. 102] the ultimate fact and issue is whether such person was bereft of the free exercise of his willpower."

The trend of modern authority is to the effect that a contract obtained by so oppressing a person by threats as to deprive him of his free exercise of his will may be voided on the ground of duress. What constitutes duress is a matter of law, whether duress exist in a particular transaction is usually a matter of fact."

The case of *Cooper, et al., vs. Cooper*, 69 SO, 2nd 881, (1954), was decided by the Supreme Court of Florida where an action was brought by a former wife against her former husband to set aside a certain deed which the wife had allegedly signed under duress. The Court stated at Page 883, while giving the definition of duress, "As was said in the last cited case *"Duress is a condition of the mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do and act or make a contract not of his own volition."* (Emphasis added)

In the case of *Newsom vs. Medis*, 205 Okl. 574, 239 P 2nd 784, (1951) the Plaintiff brought an action against the Defendant for actual damages and punitive damages for duress in the signing of a contract. The Court stated at Page 786, "*Duress exists when one, by an unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his free will."* (Emphasis added)

"In that case we also said, "To deprive one of his will and understanding by reason of threats or other unlawful [fol.103] means, so that a note thus obtained is not his free and voluntary act, constitutes duress."

In the case of *Cappy's Inc. vs. Dorgan, et al.*, 313 Mass. 170, 46 NE 2 538, the Court stated at Page 540 when considering whether there was duress or not: "It is settled that a person who's will and judgment are overcome by threats, fear or some other influence, and who is thereby compelled to execute a contract that he would not have made in the free exercise of his will and independent judgment, may avoid the contract on the ground of duress."

The Federal Courts have in other cases, involving citizenship and deportation, set forth certain standards and definitions for duress.

In the case of *Insogna vs. Dulles*, 116 FS 473, (1953), the Plaintiff brought an action under the Nationality Act for a declaratory judgment to establish that she was a citizen

of the United States and that there had been no expatriation or abandonment of citizenship by her because of the fact that she had accepted governmental employment in Italy. Plaintiff's testimony was that just prior to World War II she had worked as a domestic to support her Mother and sister; that with the advent of the War, the economy of the small village was so upset that she was unable to find work and that when she sought relief from the Mayor of the village she was told that the village had no money but that she was offered a job working for the government.

The Court stated at Page 475: "There is no legal requirement that this testimony be corroborated by documentry or other proof. *Pandolfo vs. Atcheson*, 2 Cir, 1953, 202 F 2nd 38. Thus, in the absence of any showing to the contrary, the Court is of the opinion that the circumstances are such as to justify a finding that the Plaintiff took the job in order to subsist. Self preservation has long been recognized as the first law of nature. In addition, common knowledge of the economic conditions and fears prevailing in a country at war lends credence to the Plaintiff's testimony. The circumstances of the acceptance of employment by Plaintiff justifiably form a basis for the finding of fact, now made by the Court, that same was involuntary and based on duress. "The means of exercising duress is not limited to guns, clubs, or physical threats." *Nakashima vs. Atcheson* DC Cal. 1951, 98 F sup 11, 13. *CF. Mendelsohn vs. Dulles*, supra.; *Ryckman vs. Atcheson*, DC Texas 1952, 106 F Sup. 739, *Schioler vs. United States*, DC 111. 1948, 75 F Sup 353."

In the case of *Schioler vs. United States*, 75 FS 353, (1948), the Plaintiff brought this action against the United States for declaratory judgment declaring that she was a citizen of the United States and that she never lost her citizenship by reason of she and her husband's petition for Danish citizenship and by reason of her having traveled to the United States on a Danish passport. The Plaintiff, her

husband, and their two children, were in Denmark when the Second World War broke out and they were apprehensive for their own safety and that of their children. They [fol. 105] were advised by Danish officials to ask for Danish citizenship because they felt it would be a protection to them and their children.

The Court states at Page 355; "The Court believes that American citizenship is a priceless heritage involving not only privileges but duties and responsibilities, and that among these duties and responsibilities are primarily loyalty and allegiance to the United States. *However, in considering this case, the court also recognized that self preservation is nature's first law and that it is quite natural for mothers and fathers to seek in every way to preserve the lives of their children when their safety is threatened.* (Emphasis added) When an American citizen finds himself and his family as Paul Schioler did, in the theater of war, their safety threatened, facing the gravious of dangers, even possible death or interment, and in this extremity, on the advice of officials of a foreign state where he happens to be, makes application for foreign citizenship in an effort to preserve the lives and safety of his family, his wife joining in the application, I am of the opinion that under such circumstances the joinder of the wife is not such a voluntary renunciation or abandonment of her nationality as to forfeit her American born citizenship.

I therefore conclude, after a careful consideration of all of the facts in this case, that Petitioner, by joinder in her husband's application did not loose her native born United States citizenship, and that she remains a citizen of the United States and entitled to all the rights and privileges of such United States citizenship and I so hold."

[fol. 106] In the case of *Nakashima vs. Atcheson*, 98 FS 11, (1951), the Plaintiff brought this action against the Secretary of State for declaratory judgment declaring her to be a national of the United States. The Plaintiff in the year 1946 voted in a Japanese political election, which was

the first in which women were permitted to vote. The occupation authorities were bringing intense pressure on the Japanese people in an effort to induce them to participate in the democratic process and to exercise their right of suffrage. The testimony of the Plaintiff disclosed that she had the fixed purpose of returning to this country at the first opportunity and was fearful of any interference with her plans and thought that if she did not vote in the election she would displease the occupational authorities and might encounter some difficulty in returning to the United States as a result of not voting.

The Court stated at Page 13: "*The means of exercising duress is not limited to guns, clubs, or physical threats. The fear of loss of access to ones country, like the fear of loss of a loved one, can be more coercive than the fear of physical violence. The Plaintiff's act of voting was not of her own choice, it was impelled by the influence of those who stood in position of authority and was not a voluntary act.*" In view of this finding the court held that the Plaintiff did not loose her American citizenship by voting in the election. (Emphasis added)

In the case of *Mendelsohn vs. Dulles*, 207 F 2nd 37, (1953) Plaintiff further brought this action for declaratory judgment to be declared a national of the United States on the ground that he had voluntarily resided in a foreign country for more than five years due to financial inability [fol. 107] to buy passage and because of his wife's illness. The Court stated at Page 39: "The Secretary thus presses upon us the adoption of a Spartan standard by which to determine whether the appellant acted voluntarily. He says that Mendelsohn could have embarked for America, turning away from the sick bed and leaving his wife to the care of others while he traveled thousands of miles to retain his nationality. It was indeed physically impossible, and the appellant could have done it if he could have overcome those natural impulses which imperatively require a husband's continued presence with his wife who lies seri-

ously ill. The Secretary's argument disregards the duress of devotion. Mendelsohn acted, it seems to us, under the corrosion of marital affection, which was just as compelling as physical restraint."

In the case of *Ryckman vs. Atcheson*, 106 FS 739, (1952) the Plaintiff brought this action to obtain a declaratory judgment that she was a national of the United States. The Plaintiff had returned to Canada for periods of time in order that she might take care of her mother who was then 78 years of age and in poor health. The Court stated, when attempting to determine if the Plaintiff stay in Canada was voluntary or not, at Page 741, quoting the case of *Nakashima vs. Atcheson*, 98 FS 11, (1951) a voluntary act is defined as "an act proceeding from who's own choice or full consent unimpelled by another influence." The Court further stated at page 741; that the fear of the loss of a loved one who was not physically able to care for [fol. 108] herself and who had no one in the world to care for or stay with her, was in effect duress.

In the case of *Rex vs. Steane* (1947) K B 997, (1947) 1 ALL ENG 813-cca, it was held that the conviction of the Defendant for doing acts likely to assist the enemy and with intent to do so, namely, radio broadcasting in Germany, during the War, could not stand, not only because the criminal intent had not been proved, but also because the trial court in summing up had failed to remind the jury of the various threats made by the Germans that Defendant's wife and children would be put in a concentration camp if he did not obey, and that there were methods of making people do things as well as beatings to which Defendant swore he would have been exposed, since the prisoners defense must be fully put to the jury.

The case at Bar is similar in facts to the case of *Schioler vs. United States*, *supra*. in that that case the Court recognized that self preservation is nature's first law and it is quite natural for mothers and fathers to seek in every way to preserve the lives of their children when their

safety is threatened. This is an identical situation with what happened in the case at Bar. The Respondent's every act was performed in order to save what she thought was the life of her child. If there was any fraud perpetrated, it was perpetrated by the Respondent's husband when he told her about the need for the child's operation. The relationship between husband and wife has always been one of the utmost confidence, and certainly the Respondent had [fol. 109] every right to believe what her husband told her about her child, who was already sick. She felt that the life of her child was so important to her that she was willing to sell herself to save it.

This Special Inquiry Officer seems to be of the opinion that in order to show that a person acted under duress, it is necessary to show that he or she was physically forced to perform an act. Physical force is but one means of duress. When a person, such as the Respondent was in this case, is reduced to such a state that his or her free agency is practically destroyed, then he or she is not exercising his or her free will and is acting under duress.

[fol. 110]

Conclusion

The Respondent began the practice of prostitution for one purpose and for one purpose only, that was, to obtain money so that her child could have an operation which she had been told, by her husband, was necessary, and which she believed was necessary to save the child's life.

When considering the confidential relationship between the Respondent and her husband, we would expect that she would believe what her husband told her about her son needing an operation.

As a result of this belief that her son needed such an operation, and that because she was destitute, she was reduced to such a state of mind and physical condition that it is apparent that she was not acting under a free will in order to choose, as a rational person would, what her acts

were, and were going to be, but rather, she was acting under duress. It is clear that these acts which the Respondent performed were performed as a result of duress, and therefore, under the aforementioned cases, she is not legally and/or morally responsible for her acts.

There is no showing in the record, or any other place, that the Respondent had ever practiced prostitution, or had committed any immoral acts prior to this two month period, and subsequent to this two month period.

The testimony shows that the Respondent is highly regarded by the other witnesses at the hearing, and each of them testified that she had not practiced prostitution subsequent to the Spring of 1957. There is nothing in the record which would indicate that the Respondent's testimony is not completely true.

[fol. 111] We respectfully submit that the Order of Deportation heretofore issued by the Special Inquiry Officer should be reversed, and the Respondent be permitted to stay in this country.

Sidney G. Kusworm, Jacob A. Myers, Attorneys for
Respondent.

[fol. 113]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

AND

IMMIGRATION AND NATURALIZATION SERVICE

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY
OR REPRESENTATIVE

.....
(City)

(State)

January 21, 1963

.....
(Date)

File No. 10331472

In re: ELIZABETH ROSALIA WOODEY

Note:—Show below complete address of subject

.....
(Address)

(Apartment number)

.....
(City)

(State)

I hereby enter my appearance as attorney for (or representative of):

.....

or as associated with
the attorney of record, and my appearance is at his request.

(Check appropriate item, if applicable:)

- ☐ 1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia

.....and am not under a court or
(Name of court)

administrative agency order suspending, enjoining, restraining, disbaring, or otherwise restricting me in practicing law.

☐ 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:

☐ 3. Others (Explain fully.) Did not appear. AWB.

.....
(Signature)

Atty. Sidney G. Kusworm

.....
(NAME—Type or print)

.....
(Address)

.....
(Telephone number)

[fol. 114]

REQUEST FOR CONTINUANCE
Received January 21, 1963

(Letterhead of Kusworm and Kusworm, Dayton, Ohio)

January 18, 1963

Board of Immigration Appeals
10331472
Elizabeth Rosalia Woodby

United States Department of Justice
Board of Immigration Appeals
Washington, D.C.

Attn: Thos. G. Finucane

Dear Mr. Finucane:

The above case has been set for hearing before you on Monday, January 21, 1963.

I have attempted to get in touch with Mrs. Woodby to determine if she wishes us to attend and represent her at this hearing, but I have not been able to do so.

I realize this request is late, but I am requesting a continuance of this hearing so that I may determine the wishes of my client. I feel that because of the gravity of this matter, she should be given every chance to have her story told at the hearing.

Thank you for your consideration in this matter.

Very truly yours,

Kusworm & Kusworm
Jacob A. Myers

[fol. 115]

BEFORE THE BOARD OF IMMIGRATION APPEALS

Oral Argument: January 21, 1963

In Re: ELIZABETH ROSALIA WOODY

File: A-10331472

Board: Mr. Griffin, Chairman, Miss Wilson, Mr. Cozier, and Mr. Montaquila.

Heard: (Sidney G. Kusworm, Attorney), 403 Keith Bldg., Dayton 2, Ohio, did not appear;

Irving A. Appleman, Service Representative before the Board.

Request: Service wants Deportation.

ARGUMENT OF MR. APPLEMAN

Mr. Appleman: The initial thing that bothers me in this case, is the statement on the reverse of the I-290, to the general effect, I forget the exact language, that he, (the attorney), had been prejudiced because he wasn't furnished a transcript of the hearing, and didn't get a chance to file a brief before the decision. Upon that there is nothing in the record to show that he asked for a transcript of the hearing. It is customary to make available a copy of the transcript to the attorney if he asks for it; I see no reason in the

world why this case would be an exception. There is no reason in the world why he couldn't obtain and look at a transcript of the hearing. There is no indication whatsoever that he *asked* for it.

The hearing was held, I believe, in March, 1962, and the decision was not rendered until I believe, October of 1962. Now during all of that time counsel had the opportunity to submit a brief if he wanted to. Lastly, he *did* file his I-290; you will note on it that he asked for additional time to file a brief, and since the case comes forward to us, that is to the Board, with a somewhat lengthy brief attached to it, and was received here only within the month, one must assume he was given that additional time and did file his brief, so that the statement as to his being prejudiced is not borne out by the record.

Now on the merits of the case, I don't know how much argument is needed by me. There are of course what would appear at first glance, and at superficial glance, that there are possible extenuating or sympathetic features in the case, but they do not stand up on a close examination. What you have here is a woman who is a widow, who came here [fol. 116] as wife of a U.S. citizen in 1956. At the time she entered she already had a child, and then after she came here another child was born; this was a premature birth, that child was born in August, 1956. Then they split up, and the husband left; first she left and she came back and the husband left, and the story is that about 6 or 8 months after the birth of the child, which would place it somewhat around February to April, in 1957, she got a telephone call from her husband who had left her. He said, and she wasn't too sure about this, but either he, the husband, or the child was ill, and needed an operation.

Later on she changed it, and resolved that it was the child that needed the operation, not the husband. But if you will note her original statement, she wasn't sure which it was. At any rate the operation was needed, which her child, ac-

According to the story, the infant child then about 6 or 8 months old, for which \$300 was required, and of course she said she didn't have it. But then we get to the business of the vacuum cleaner salesman who appears at the door fortuitously and he loans the money to her, and she then enters into a life of prostitution, where he acts as the procurer.

This drama plays itself out, according to her story, for about two months, after she has achieved enough income from this source to pay back the vacuum cleaner salesman the \$300; she tells him that she no longer will, (and this is actually her own story), no longer will have anything to do with this sordid life. The story is difficult to accept, and this they claim is duress. All other considerations apart, this is a woman who—well, first of all she must have entered into this life of prostitution before the death of her husband, and he died in an accident around July of 1957; presumably she began a life of prostitution early in 1957, when the phone call came, or a day or so after.

At any rate she left him originally to go up to Pennsylvania. The child had just come out of the hospital, and this is an infant child, premature at birth, she doesn't take the child with her but goes up to Pennsylvania and some friend talks her into coming back, and she does. The husband then leaves with the children, and she goes on about her business. With respect to the phone call, here is a phone call coming, (and taking her story at its best), coming from her husband, who according to her is completely unreliable and untrustworthy, who has never supported her and never worked other than a little job that she managed to get for him through a friend. Now he tells her that her child, infant child is in the hospital, or at least needs an operation, is very seriously ill and can't survive presumably without this operation.

Now the normal reaction of any mother under these circumstances would be to rush off to the child. You don't

have any indication whatsoever of that. She knew where the husband was because she sent the money right away, the very next day, as soon as she got it from the vacuum cleaner salesman, but apparently she made no effort to see this infant child of hers who was so *very* sick. That is one aspect of it.

[fol. 117] Beyond that there is a very serious question how long she participated in this activity. Now she testified that the incidents took place a couple of times a day, for \$5.00 or \$10.00 or \$15.00 each incident, over a period of two months, 4 or 5 days a week, and that was enough to pay off the \$300. Actually in the statement that was given to the Service she testified that she continued this life up until the time she met a certain Amicon, whose statement is also in the record. Now he testified that he met her sometime in the latter part of 1957, October or December, somewhere around there, which would mean she continued this activity from the early part of 1957, roughly anywhere from February or April of 1957, to at least October, November or December of 1957, which is a considerably longer period than the two months that she said; and during which period of time she would obviously, according to her own testimony, have gained more than the necessary \$300.

She did have another job incidentally, apart from these considerations, and even accepting the two-months proposition, it is submitted that you do not have anything in the way of duress, as we know it. Here is a woman who enters into this activity to raise a sum of money. She is not compelled to do it, insofar as the procurer holding her prisoner or compelling her or anything of that sort. She continued that activity over this period of time for one reason, to pay ostensibly for the hospitalization or treatment of the child. There was no effort to contact the proper authorities, to assume the burden, if it is true, (assuming the statement given by her thoroughly unreliable husband, according to her, over the phone, is the truth), and merely on that basis alone she enters into a life of prostitution.

No effort to resist the means that she did pursue was made, or to find another way of taking care of the child, even assuming the facts to be as she claims. It is submitted that first the story is a thoroughly incredible one. It reads like the libretto of an opera, or an operetta, but then assuming that, you do not have any duress in any legal sense, as we understand it.

mb

[fol. 118]

ORDER EXTENDING TIME TO FILE BRIEF

Board of Immigration Appeals

In re: ELIZABETH ROSALIA WOODBY

File: A10 331 472

January 24, 1963

Jacob A. Myers, Esquire

Kusworm & Kusworm

403 Keith Building

Dayton 2, Ohio

Dear Mr. Myers:

Your letter dated January 18, 1963, requesting a continuance of hearing in the above case, was not received by this office until January 21st after oral argument had been heard. A copy of the transcript presenting the Service's view is enclosed for your use.

In order to afford your client another opportunity to be heard you may submit a brief in reply to oral argument on or before February 8, 1963, for our consideration before final decision is rendered.

A copy of the transcript of hearing held in March 1962 will undoubtedly be made available to you upon request at the Immigration office in Cleveland.

Sincerely yours,

Thomas G. Finucane, Chairman

Enclosure

[fol. 119]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File A10 331 472

In the Matter of

ELISABETH ROSALIA WOODBY, Respondent.

BRIEF

REPLY OF RESPONDENT TO ORAL ARGUMENT

Received February 7, 1963

Kusworm and Kusworm, Attorneys at Law, By
Sidney G. Kusworm and Jacob A. Myers, Attor-
neys for Respondent.

[fol. 120] The factual situation in this case, as set forth by the Service Representative, Irving A. Appleman, is distorted as to the facts in this case.

The record is quite clear that Mrs. Woodby's husband called her and stated that her child was ill and needed an operation (H.R. 29). Because of being practically unable to speak the English language, and unable to earn money in any other way, and because of the pressure and force of believing her child would die if he did not have the needed operation, Mrs. Woodby entered into prostitution, which she stopped over five (5) years ago, when she earned the three hundred dollars needed for the alleged operation. The entire period of this action lasted over a period of two months, and Mrs. Woodby has not engaged in any acts of prostitution since that time. It is quite apparent from evidence in this case, that Mrs. Woodby never would have engaged in prostitution, and as a result thereof, jeopardized her life in America by engaging in prostitution if she did not believe that the life of her son was in danger, if she did not supply this money.

Mr. Appleman then states that this is a difficult story to accept. We agree that it is difficult to believe that some-

thing like this could happen in America, but I will not agree that the story is a difficult one to accept. The only evidence in this case is the testimony of Mrs. Woodby, and if we are going to accept her statement, we are going to have to accept her *entire statement* as to its truth. There is nothing in the record to contradict this part of Mrs. Woodby's statement, other than the Governments argument that it is difficult to believe.

The statement is then made that Mrs. Woodby originally left to go to Pennsylvania, and that she went without the [fol. 121] child and some friend talked her into coming back. At the hearing of this matter (see H. R. 27), Mrs. Woodby stated that she was forced to go on the bus, with only Ten Dollars (\$10.00) and to leave her child at home; this is quite different from the argument as set forth by the Government.

The argument is then proposed that if Mrs. Woodby loved her child, she would have run to Kentucky to see the child, rather than trying to get the money. This may be very true, if she had the money to go to Kentucky, and if she were not persona non grata with her husband's parents, and if she had the Three Hundred Dollars (\$300.00) to pay for the operation when she got there, and if she did not have her other child with her in Dayton, Ohio.

It appears that the argument is also had to the effect that Mrs. Woodby did not do the rational thing in a certain set of circumstances. This may very well be true, but we are not here to argue as to what the normal reaction of a mother is under a certain set of given circumstances, but rather we are arguing what this mother did under these circumstances.

The question now arises as to how long Mrs. Woodby engaged in acts of prostitution. She testified that it was approximately two months before she had repaid the \$300.00 (H. R. 8). The testimony is also in the record that she moved to Knoxville, Tennessee, and returned to Dayton, Ohio, on July 4, 1957 (H. R. 34). She lived at

Rugby Road from July 4th until sometime in September, when she moved to 1500 West Riverview, where [fol. 122] she was working (H. R. 40). That is where Mr. Amicon met Mrs. Woodby in October of 1957 (H. R. 18). These facts are in contradiction to the facts as set forth by the Government. If we assume that the facts as set forth by Mrs. Woodby are true, then her acts were as a result of duress, and she is not legally responsible for them. In Mrs. Woodby's statements, and at the hearing, she admitted having engaged in prostitution, but she also admitted the facts leading up to these acts. We, therefore, must assume that her entire story is true, for if she were going to lie about anything, the most logical thing to lie about would be the acts of prostitution, not the acts of circumstances which led up to the prostitution.

In order to show duress, it is not necessary to show that one was physically forced into such an act. Numerous cases were cited in the Brief of the Respondent, which show that the acts complained of were performed under duress. Since these acts were performed under duress, Mrs. Woodby is not legally responsible for them, and the order of deportation previously entered should be reversed.

Respectfully submitted:

S. G. Kusworm, Jacob A. Myers, Attorneys for Respondent.

[fol. 123]

LAW OFFICES
KUSWORM AND KUSWORM
FOURTH FLOOR, KEITH BUILDING
DAYTON 2, OHIO

SIDNEY G. KUSWORM, SR.

SIDNEY G. KUSWORM, JR.

JACOB A. MYERS

TELEPHONE 223-6208

AREA CODE 513

February 6, 1963

Mr. Thomas G. Finucane, Chairman
Board of Immigration Appeals
United States Department of Justice
Washington, D. C.

Re: ELIZABETH ROSALIA WOODBY
File: A10 331 472

Dear Mr. Finucane:

Enclosed is an original and two copies of the Reply of the Respondent to the Oral Argument of the Government. I would appreciate the Board considering this in connection with the briefs which have been previously filed in your determination of this case.

Will you be so kind as to forward one of these copies to Mr. Appleman, as I do not have his address.

Thank you for your consideration in this matter.

Very truly yours,

KUSWORM AND KUSWORM

By /s/ JACOB A. MYERS
Jacob A. Myers

JAM/dot
encls.

[Stamp—Received—Feb 7—1963—Board of Immigration Appeals]

[fol. 124]

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

File: A-10331472—Cleveland

In re: ELIZABETH ROSALIA WOODY

In Deportation Proceedings

Appeal

Oral Argument: January 21, 1963

On behalf of respondent: Sidney G. Kusworm, Esq., 403 Keith Building, Dayton 2, Ohio (Did not appear submitted case on brief).

On behalf of I&N Service: Irving A. Appleman, Esq.

Charges:

Order: Sec. 241(a)(12), I&N Act (8 USC 1251(a)(12))
—Prostitution after entry.

Lodged: None

Application: Termination of proceedings

OPINION—March 8, 1963

The case comes forward on appeal from the order of the special inquiry officer dated October 30, 1962, finding the respondent deportable on the charge stated above and directing her deportation to Germany or, in the alternative, to Hungary.

The respondent is a native of Hungary, a citizen of Germany, 30 years old, female, whose last and only entry into the United States occurred on or about February 7, 1956, at the port of New York. She had married a United States citizen serving in the United States Armed Forces in Germany on January 8, 1955, and a daughter was born to them in Germany. The respondent and her daughter lived with

[fol. 125] her husband's parents in Harlan, Kentucky, for a few months and then came to Dayton, Ohio, where a son was born on August 13, 1956. This was a premature birth and, as a consequence thereof, the baby remained in the hospital for several months. The respondent testified that when the baby was released from the hospital she and her husband quarreled and her husband virtually forced her to visit a friend in Pennsylvania; that she returned after one day to find that her husband had taken the baby and left for Harlan where her daughter already was. This would have been about December 1956.

When the son was about six to eight months old, the respondent testified she received a phone call from her husband telling her that the baby son required hospitalization and that \$300 was needed at once. The next evening she was alone in her apartment, crying, when a vacuum cleaner salesman called, to whom she told her troubles. After a few drinks the salesman offered to advance her the money to be repaid from what she received from men he would send to her. Compelled by circumstances, the respondent agreed; a man with the salesman took some photographs of her in the nude. She received the \$300 which she sent to her husband and continued the practice of prostitution for about eight weeks from April 1st 1957 until she was able to repay the salesman. She then wanted to quit but the salesman threatened to report her to the police or immigration authorities and she continued for another two weeks but when she met a Mr. Amicon she quit prostitution.

In her statement dated November 20, 1961 (Ex. 2) the respondent at first testified that she engaged in illicit sex acts but maintained that she only received gifts for such occasional acts, that she did not solicit men in such acts and that she had sexual relations with only three men since her marriage. She further testified that about six or eight months after her son was born her husband asked her for money to pay for the son's hospitalization and that she borrowed \$300 from a vacuum cleaner salesman named Tom

Wally but that she received only \$40 or \$50 from illicit [fol. 126] sexual relations. She stated that her employer took the \$300 out of her pay. After being admonished to tell the truth, she then stated that Mr. Wally, who had called on her to demonstrate a vacuum cleaner, and to whom she told the story of needing \$300, agreed to give her \$300 if she would practice prostitution and that she agreed although she did not realize it was prostitution and that men paid her \$5 or \$10; that after she had the \$300 she sent it to her husband and as far as she knows the boy had the operation and is all right. In her statement she testified that she indulged in this practice for about two months, the first time in Summit Court and that she received two men a day for three or four days a week and that all these acts occurred at the Summit Street address.

According to the respondent's story she practiced prostitution from about April to June 1957. Mr. Amicon, in his statement of November 15, 1961 (Ex. 3) stated that he first visited the respondent for the purpose of sexual intercourse about the first of December 1957 when the respondent was living at 1500 West Riverview, that he could not go through with it but left her the money anyway. He stated he then went back with his wife for Christmas and resumed a sexual relationship with the respondent about February 1958 but he did not pay for it and that sex turned into love. This witness admitted making a statement to the police acknowledging that he had paid the respondent for prostitution but he said he did so to prevent the officers from taking the respondent's child to a children's home. Mr. Amicon stated that he did not know of any other persons with whom she engaged in acts of prostitution and did not know that she was a prostitute other than those times when he paid her for such acts (Ex. 3, p. 7). He also confirmed respondent's story to the extent that she had told him that her little boy needed an operation in the amount of \$300 and that a vacuum cleaner salesman, to whom she had told her troubles, arranged for her to practice prostitution to raise the money.

[fol. 127] Mr. Amicon appeared as a witness at the hearing and testified that he met the respondent about October 1957, and that he was told by a friend that she practiced prostitution, that he visited her for that purpose but did not have sexual relations at that time although he left her \$10. The witness corrected his statement of November 15, 1961, to the effect that he did not pay the respondent for acts of prostitution.

The respondent stated that she resided at Summit Court, Dayton, Ohio, about two months after her husband left her in December 1956, or about February 1957, and resided there about a year and a half (Ex. 2, pp. 3-4). She testified that she stayed at Knoxville, Tennessee, for three months and returned on July 4, 1957, or 1958 when Mrs. Jackson picked her up. (Tr. pp. 34-35); that she lived with Mrs. Jackson for two weeks on Rugby and then they moved to an apartment at 1500 Riverview above Neil's where she was working. She further testified that she lived with Mrs. Jackson about a year.

Mrs. Arlene Jackson appeared as a witness for the respondent and testified that the respondent called her from Knoxville, Tennessee, to pick her up and that she returned to 1936 Rugby Road, Dayton, Ohio, on July 4th; that they moved in September to 1500 West Riverview above Neil's where they lived until between Christmas and New Year's, 1958. She stated that the respondent lived with her until about February 1961, a total period of two and a half years.

It is noted that the respondent had first denied the practice of prostitution, stating that she engaged in illicit intercourse for gifts only three months; and then later changed her story to the effect that she engaged in prostitution as a result of an urgent request from her husband, from whom she was separated, for \$300 to pay for hospitalization for their son; that she entered into prostitution as a result of an arrangement with a vacuum cleaner salesman and

that she practiced prostitution from April 1957 for eight to ten weeks or until June or July 1957. A witness, Mr. Ami- [fol. 128] con, has testified variously that he met the respondent in October or December 1957 at 1500 West Riverview above Neil's when he was referred to her as a practicing prostitute. A witness for the respondent, Mrs. Jackson, has testified that the respondent moved with her to 1500 West Riverview above Neil's in September 1957 and remained there until 1958. They continued living there until Christmas or New Year's of 1958. The testimony of these witnesses makes it apparent that the respondent was engaged in the practice of prostitution until about October or December 1957 and not, as she claimed, until June or July 1957.

Even if respondent's bizarre story that she engaged in prostitution to raise \$300 for her son's operation is accepted, it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958, long after she had repaid the loan from the vacuum cleaner salesman. While it is not clear from the testimony whether it was 1957 or 1958, taking the evidence most favorable to the respondent it was at least late 1957. Even if the respondent's story is to be believed, even if it be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress, nevertheless the continuance of the practice of prostitution until at least late 1957 is not explained and cannot be defended on the ground of duress. Upon a full consideration of all the evidence of record, it is concluded that the evidence establishes deportability on the charge contained in the Order to Show Cause. The appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane, Chairman.

[fol. 129]

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

March 8, 1963

(Insignia)

Address Reply to the
Division Indicated
and Refer to Initials and Number
Board of Immigration Appeals

Woodby
A-10331472

Sidney G. Kusworm, Esquire
403 Keith Building
Dayton 2, Ohio

Reference is made to your interest in the above case.

For your information, there is enclosed herewith copy of the decision and order of the Board of Immigration Appeals.

Sincerely yours,

Thos. G. Finucane
Chairman

[fol. 130]

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

WARRANT OF DEPORTATION—March 18, 1963

No. A-10 331 472

To any Officer or Employee of the United States Immigration and Naturalization Service.

WHEREAS, after due hearing before an authorized officer of the United States Immigration and Naturalization Service, and upon the basis thereof, an order has been duly made that the alien Elizabeth Rosalia WOODBY who entered the United States at New York, New York on the 7th day of February, 1956, is subject to deportation under the following provisions of the laws of the United States, to wit:

Section 241(a)(12) of the Immigration and Nationality Act, in that, by reason of conduct, behavior or activity at any time after entry you became a member of any of the classes specified in section 212(a)(12), to wit, aliens who have engaged in prostitution.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to take into custody and deport the said alien pursuant to law, at the expense of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1963".

For so doing this shall be your sufficient warrant.
Witness my hand and seal this 18th day of March 1963.

At Cleveland, Ohio.

/s/ THOMAS M. PEDERSON
Thomas M. Pederson, District Director

[fol. 131]

Port of

Date

WARRANT FOR DEPORTATION OF

Executed, 19... S. S.

.....
(Signature of officer).....
(Title)

[fol. 132]

BEFORE THE BOARD OF
IMMIGRATION APPEALS

File A10 331 472

In the Matter of

ELIZABETH ROSALIA WOODBY, Respondent.

MOTION TO RECONSIDER—Filed May 17, 1963

Comes now Elizabeth Rosalia Woodby, by her attorneys, and moves the Board of Immigration Appeals to reconsider its previous decision whereby said Board found the Appellant to be subject to deportation.

Kusworm & Kusworm, Attorneys for Elizabeth Rosalia Woodby.

[Stamp—1963 May 17 AM 11:00—U. S. Immigration and Naturalization—Cleveland, Ohio]

[fol. 133]

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: May 17, 1963

To: Chairman, Board of Immigration Appeals,
Department of Justice, Washington 25, D.C.

FROM: Thomas M. Pederson, District Director,
Immigration & Naturalization Service,
Cleveland, Ohio

SUBJECT: A10 331 472; ELIZABETH ROSALIA WOODBY;
Motion to Reconsider

The record file relating to the subject is transmitted herewith for your consideration of the respondent's motion to reconsider the Board's order of March 8, 1963, dismissing the appeal.

This office has directed the respondent to surrender herself for deportation on May 28, 1963, and it is felt that the present motion is of a frivolous and dilatory nature.

Deportation will therefore not be stayed pending consideration of the present motion by the Board of Immigration Appeals.

THOMAS M. PEDERSON

[fol. 134]

BEFORE THE BOARD OF
IMMIGRATION APPEALS

REQUEST FOR ORAL ARGUMENT ON MOTION FOR
RECONSIDERATION—Received May 23, 1963

LAW OFFICES
KUSWORM AND KUSWORM
FOURTH FLOOR, KEITH BUILDING
DAYTON 2, OHIO

SIDNEY G. KUSWORM, SR.
SIDNEY G. KUSWORM, JR.
JACOB A. MYERS

TELEPHONE 223-8208
AREA CODE 513

May 21, 1963

Mr. Thomas G. Finucane, Chairman
Board of Immigration Appeals
United States Department of Justice
Washington, D. C.

Re: Elizabeth Rosalia Woodby
File—A-10-331 472

Dear Mr. Finucane:

I have filed a Motion to Reconsider on behalf of Elizabeth Rosalia Woodby, and in support thereof, have filed Affidavits with the Cleveland Office of the Immigration and Naturalization Service. This Motion and these Affidavits will undoubtedly be forwarded to you by the Cleveland Office.

However, at this time, I would like to request an oral hearing on this Motion to Reconsider, as I feel that a great injustice has been done my client.

Very truly yours,

/s/ JACOB A. MYERS
Jacob A. Myers

JAM:vb

[Stamp—Received—May 23, 1963—Board of Immigration Appeals]

[fol. 135]

BEFORE THE BOARD OF
IMMIGRATION APPEALS

LETTER TRANSMITTING AFFIDAVITS—Received May 20, 1963

FILE ROOM

LAW OFFICES
KUSWORM AND KUSWORM
FOURTH FLOOR, KEITH BUILDING
DAYTON 2, OHIO

SIDNEY G. KUSWORM, SR.

TELEPHONE 223-6208

SIDNEY G. KUSWORM, JR.

AREA CODE 513

JACOB A. MYERS

May 17, 1963

United States Department of Justice
Immigration and Naturalization Service
600 Standard Building
Cleveland 13, Ohio

In Re: ELIZABETH ROSALIA WOODBY
File No. A10 331 472

Gentlemen:

Pursuant to my letter of May 14, 1963, in which I forwarded to you a Motion to Reconsider the decision of the Board of Immigration Appeals and also a check for \$25.00 to cover the cost thereof, I am enclosing an original and two copies each of the affidavits of Elizabeth Woodby and Anthony Amicon. These two affidavits are necessary in order to straighten out the time sequence of the events as they happened to Elizabeth Woodby.

I am also requesting an oral argument on this Motion to Reconsider. Please advise immediately if the deportation

[Stamp—1963 May 20—AM 9:55—U. S. Immigration and Naturalization—Cleveland, Ohio]

order has been withdrawn until this motion to reconsider has been decided.

Very truly yours,

/s/ JACOB A. MYERS
Jacob A. Myers

JAM/dot
encls.

cc: Thomas G. Finucane, Board of Immigration Appeals,
Washington, D. C.
Immigration and Naturalization Service,
Cincinnati, Ohio
Elizabeth Woodby

[Stamp—Immigration and Naturalization Service—May 23
—11:28 AM '63—Cincinnati, Ohio]

[fol. 136]

AFFIDAVIT

United States of America,
State of Ohio,
County of Montgomery, ss.:

Anthony Amicon, being first duly cautioned and sworn, deposes and says that in approximately October of 1957, while at Neil's Restaurant, 1500 West Riverview Avenue, Dayton, Ohio, he met Elizabeth Rosalia Woodby, who was a waitress working in the restaurant at that time;

Affiant further sayeth that the person he was with told him that Elizabeth Rosalia Woodby was "in the business;"

Affiant further sayeth that he went to Elizabeth Woodby's apartment and spoke with her at some length there, and she told him the entire story concerning the prostitution and her contact with Tom Walley;

Affiant further sayeth that he gave Elizabeth Woodby the sum of \$10.00 so that she would have some money to

go to Harlan, Kentucky to see her children who were then staying with her in-laws;

Affiant further sayeth that to the best of his knowledge, Elizabeth Woodby has never engaged in any acts of prostitution as long as he has known her.

Affiant further sayeth not.

Anthony Amicon

Sworn to and subscribed in my presence by the said Anthony Amicon this 18th day of May, 1963.

Jacob A. Myers, Notary Public
Jacob A. Myers, Notary Public, Attorney at Law,
In and for the State of Ohio, My Commission has
no expiration date, Section 147.03 R. C.

(Seal)

[fol. 137]

AFFIDAVIT

United States of America,
State of Ohio,
County of Montgomery, ss.:

Elizabeth Rosalia Woodby, being first duly cautioned and sworn, deposes and says that beginning in approximately February of 1957, she engaged in acts of prostitution in order to obtain the sum of \$300.00 for an operation for her son which she was told by her husband that her son needed, and that if she did not obtain the sum of \$300.00, that her son would not be able to have the operation and she believed that he would probably die as a result thereof; that she engaged in acts of prostitution for approximately two months, which was the time it took her to earn this sum of \$300.00 to repay one Tom Walley;

Affiant further sayeth that as soon as she repaid this sum of \$300.00, which was approximately in April of 1957,

she stopped engaging in acts of prostitution and has never done so since that time;

Affiant further sayeth that Tom Walley attempted to blackmail her by threatening to report her to the Immigration authorities or to the police, if she did not continue engaging in acts of prostitution;

Affiant further sayeth that in an attempt to get away from Tom Walley, she left Dayton, and went to Knoxville, Tennessee in April of 1957, where she remained for approximately three months until July 4, 1957, when Mrs. Arlene Jackson picked her up and brought her back to Dayton, Ohio;

Affiant further sayeth that she lived with Mrs. Arlene Jackson at 1936 Rugby Road, Dayton, Ohio from July 4, 1957 until September of 1957 when they moved to 1500 West Riverview Avenue, Dayton, Ohio, which is the apartment above Neil's Restaurant;

Affiant further sayeth that she met Mr. Amicon in Neil's Restaurant, while she was working there, some time in October of 1957.

Affiant further sayeth not.

Elizabeth Rosalia Woodby

Sworn to and subscribed in my presence by the said Elizabeth Rosalia Woodby on this 18 day of May, 1963.

Jacob A. Myers, Notary Public
Jacob A. Myers, Notary Public, Attorney at Law,
In and for the State of Ohio, My Commission has
no expiration date, Section 147.03 R. C.

(Seal)

[fol. 138]

OFFICE MEMORANDUM

UNITED STATES GOVERNMENT

A10 331 472

DATE: May 23, 1963

To: Chairman, Board of Immigration Appeals
Department of Justice, Washington, D. C.

FROM: Roy Anadell, Officer in Charge
Cincinnati, Ohio

SUBJECT: Elizabeth Rosalia Woodby, A10 331 472;
Motion to Reconsider

The record file relating to the subject was transmitted May 17, 1963 for your consideration of the respondent's motion to reconsider the Board's order of March 8, 1963 dismissing the appeal.

The attached letter and affidavits, in support of the motion to reconsider, are transmitted herewith.

Attachment

/s/ ROY ANADELL

[Stamp—Received—May 24, 1963—Board of Immigration Appeals]

[fol. 139]

COLLECT

May 27, 1963

Sidney G. Kusworm, Esquire
403 Keith Building
Dayton 2, Ohio

Re Elizabeth Rosalia Woodby A-10331472 Board May 27th
ordered that application for oral argument and motion for
reconsideration be denied. Decision follows.

Thomas J. Griffin
Acting Chairman

Board of Immigration Appeals

[Stamp—Mailed May 27, 1963—Board of Immigration
Appeals]

[fol. 140]

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

May 27 1963

File: A-10331472—Cleveland

In re: Elizabeth Rosalia Woodby

In Deportation Proceedings

Motion

On Behalf of Respondent:

Sidney G. Kusworm, Esquire, Kusworm and Kusworm,
403 Keith Building, Dayton 2, Ohio

Charges:

Order: Sec. 241(a)(12), I&N Act (8 USC 1251
(a)(12))—Prostitution after entry

Lodged: None

Application: Motion to reconsider

OPINION ON MOTION FOR RECONSIDERATION—May 27, 1963

Respondent, whose deportation is set for May 28, 1963,
moves for reconsideration of the Board's order of March

8, 1963 requiring her deportation upon the ground stated above; oral argument is requested. The request for oral argument and the motion will be denied.

Respondent, a 30-year-old female, a native of Hungary and citizen of Germany, was admitted to the United States on February 7, 1956. She was charged with having practiced prostitution after entry. The deportation proceedings reveal that respondent admitted having practiced prostitution but stated that it was under the duress of raising money to pay for an operation. The special inquiry officer and the Board found that assuming duress had been present [fol. 141] at all, respondent had nevertheless continued to engage in prostitution after the duress had been removed.

The motion gives no reason for the reconsideration but has attached to it an affidavit from the respondent and one from Anthony Amicon. Respondent states that she had engaged in prostitution for two months (February 1957 to about April 1957) to earn money to pay for an operation and sets out her whereabouts from February 1957 to October 1957. Mr. Amicon who had been a witness at the hearing stated that he met the respondent in October 1957 and to the best of his knowledge she had never engaged in acts of prostitution as long as he had known her.

The material furnished was called to the Board's attention by counsel's brief and reply brief. It was carefully considered by the Board before its order was made. We find no reason to change our previous order.

We note the motion for reconsideration is defective for failure to comply with the regulation (8 CFR 103.5) which requires that the reason upon which the motion is based shall be stated and that information as to whether the validity of the order of deportation has been the subject of judicial proceedings shall be furnished.

The case was thoroughly briefed by counsel and we find no reason advanced to hear oral argument on the motion.

Order: It is ordered that the application for oral argument on the motion for reconsideration be and the same is hereby denied.

It Is Further Ordered that the motion for reconsideration be and the same is hereby denied.

Thomas J. Griffin, Acting Chairman.

[fol. 142]

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

(Insignia)

Address Reply to the
Division Indicated
and Refer to Initials and Number

Board of Immigration Appeals

Woodby
A-10331472

May 27, 1963

Sidney G. Kusworm, Esquire
Kusworm and Kusworm
403 Keith Building
Dayton 2, Ohio

Reference is made to your interest in the above case.

For your information, there is enclosed herewith copy of the decision and order of the Board of Immigration Appeals.

Sincerely yours,

THOMAS J. GRIFFIN
Acting Chairman

Dec. teletyped CLE
4:50 p.m. 5/27/63.
AWB.

[Stamp—Received—May 29, 1963—Immigration & Naturalization—Cleveland, Ohio]

[fol. 145]

CAUSE ARGUED AND SUBMITTED

Before: Miller, O'Sullivan and Phillips, Circuit Judges.

ARGUMENT AND SUBMISSION—February 27, 1965

This cause is argued by Sidney G. Kusworm and Jacob A. Myers for Petitioner and by Charles G. Heyd for Respondent and is submitted to the Court.

[fol. 146]

JUDGMENT—September 16, 1965

On petition for review of orders of the Immigration and Naturalization Service,

This cause came on to be heard on the transcript of the record from the Immigration and Naturalization Service and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the orders of the Board of Immigration Appeals be and they are affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

Carl W. Reuss, Clerk.

[fol. 147]

No. 15637

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELIZABETH ROSALIA WOODBY, Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE, Respondent.

On Petition for Review of Denial of Motion to Reconsider.

OPINION—September 16, 1965

Before Miller, O'Sullivan, and Phillips, Circuit Judges.

O'SULLIVAN, Circuit Judge. This case is before us upon the petition of Elizabeth Rosalia Woodby to review and vacate an order of the Board of Immigration Appeals entered on May 27, 1963, denying her Motion to Reconsider its earlier order of March 8, 1963. The March order dismissed her appeal from an order of a Special Inquiry Officer directing that she be deported to Germany. The deportation proceedings were had under 8 U.S.C.A. § 1251(a)(12), which provides that,

"(a) Any alien in the United States . . . shall . . . be deported who—

. . .
(12) by reason of any conduct, behavior or activity at any time after entry became a member of the classes specified in paragraph (12) of section of 1182(a) of this title; . . ."

Section 1182(a)(12) defines as a class subject to exclusion,

[fol. 148] "(12) aliens who are prostitutes or who have engaged in prostitution . . ."

The special inquiry officer conducted a hearing pursuant to 8 U.S.C.A. § 1252, at which testimony was taken and petitioner was represented by counsel. Petitioner and three other witnesses testified at such hearing and affidavits of petitioner and another obtained upon prehearing investigation were received in evidence. The inquiry officer found that petitioner had engaged in prostitution as charged and ordered that she be deported. Petitioner concedes that she did engage in prostitution, but claims that she did so while acting under duress which arose from the circumstances hereinafter set forth.

On January 8, 1955, petitioner Woodby, a native of Hungary and a citizen of Germany, married an American soldier then in service in Germany. Two children were born of the marriage. The first, a girl, was born in Germany and the second, a boy, was born prematurely in the United States on August 13, 1956. Petitioner was admitted to the United States on February 7, 1956, and went to live with her husband and daughter at the home of her husband's parents in Harlan, Kentucky. A few months later petitioner and her husband moved to Dayton, Ohio, where the second child was born. Petitioner's infant daughter was then living with her paternal grandparents in Kentucky. It is clear from the evidence that petitioner's husband gave little attention to the support and care of his wife and children.

Petitioner and her husband and the new born son lived for a time in Dayton until, as claimed by petitioner, the husband left her in early 1957, taking the son with him, and presumably took up residence in Harlan, Kentucky, with his parents and children. The husband was killed in an automobile accident about July 14, 1957.

It was after her husband left her that petitioner entered into the practice of prostitution. Her account of the facts which she claims made such conduct the produce of duress is as follows.

[fol. 149] While working to support herself, and about April 1, 1957, (later changed to February 7, 1957), she got

a telephone call from her husband, who told her that their infant son was seriously ill and needed an operation that would cost \$300.00. He stated that he had no money or Blue Cross insurance and requested her to provide the needed cash. The next day while petitioner was alone in her apartment contemplating her plight and crying, fearful that her son would die unless she could get the money for his operation, a vacuum cleaner salesman came to her apartment. Observing petitioner's apparent state of anxiety, this man asked the cause and told her he could help her get the money. He left momentarily and shortly returned with another man and a bottle of whiskey. After petitioner had consumed some whiskey, this vacuum cleaner salesman and part-time panderer proposed that he would lend petitioner the needed money to be repaid with her earnings as a prostitute from customers he would procure. She was importuned to disrobe and have some pictures taken in the nude, presumably to aid the procurer to attract business to her. Petitioner thereupon began the regular practice of prostitution, carrying it on in addition to her employment as a waitress. She continued in this enterprise until she had earned enough to and did repay the loan. She testified that she ceased her life as a prostitute about July 1, 1957, (later changed to early April, 1957), and went to Tennessee, later to return to Dayton with a woman friend. She stated that she did not thereafter engage in prostitution, although she admitted to continuing sexual relations with a man whose first meeting with her was to keep a prostitution engagement.

A very confused record ends its identification of petitioner's activities with the latter part of the year 1958. What occurred between then and the immigration authorities' investigation of her in about the middle of 1961 is not revealed. The record suggests some effort on petitioner's part to regain custody of her children from her husband's parents, but the record is silent as to the outcome. The record [fol. 150] is likewise silent as to how and why the immigration authorities became interested in petitioner at

least three years after, as far as the record before us discloses, she discontinued activities as a prostitute. We have been told nothing as to the legal custody of petitioner's children, except for the observation in the decision of the Special Inquiry Officer that "since here citizen children are now in the legal custody of respondent (*sic*) father- and mother-in-law, there is no basis for considering that her deportation would result in extreme hardship to her children." The appendices before us give no advice as to the basis for such observation nor whether the grandparents in any way excited the government's interest in deporting petitioner. The Special Inquiry Officer further said that while at the time of the hearing in 1962 petitioner's children had been with the grandparents for two years, "there is no indication that respondent has the received custody of the children, although at the hearing she testified she had engaged a lawyer for proceedings to regain their custody."

The order of deportation provides that petitioner, the mother of these infant American citizens, "be deported . . . to Germany" and that if Germany will not accept her, "the respondent shall be deported to Hungary."

The evidence which has brought about her deportation was principally supplied by information disclosed to the authorities by petitioner herself, together with that of three obviously friendly witnesses called at the hearing before the Special Inquiry Officer. This officer's conclusions were based on this testimony and sworn statements earlier taken from petitioner and a gentleman friend of hers. This man testified that while his first meeting with petitioner in October, 1957, was to enjoy her availability as a prostitute, he fell in love with her and would like to marry her if he could obtain a divorce from his wife. We assume that, for whatever reason, this marriage has not yet taken place, although petitioner admits having sexual relations with this man after she had discontinued her prostitution until a time shortly before the hearing.

[fol. 151] The decision of the Special Inquiry Officer and the affirmance of that decision by the Board of Immigra-

tion Appeals were not based upon a conclusion that petitioner's story of entering prostitution under the duress of having to raise \$300.00 to save the life of her son was false. They referred to it as a "bizarre story" and "a hard story to believe." But they concluded that whatever the circumstances that prompted its beginning, she continued to carry on the business of prostitution after the original compulsions had ceased to operate. The Board of Immigration Appeals stated,

"Even if the respondent's story is to be believed, and even if it be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress, nevertheless the continuance of the practice of prostitution until at least late 1957 is not explained and cannot be defended on the ground of duress."

It is quite apparent that the Board and the Special Inquiry Officer arrived at their factual conclusion from the many discrepancies in petitioner's testimony and its contradiction by statements made by her in her prehearing sworn statement. There was much confusion as to the places at which and the times during which she carried on as a prostitute. Such confusion would permit a finding that her activity in this regard extended into late 1957 and possibly late 1958, and that she was freed of the claimed duress in early 1957. There is no evidence of prostitution by her after 1958 and in her address to this court she implied that she has been leading an exemplary life since the latest date that the proofs established prostitution. She testified at the hearing that she has not returned to prostitution, and the three other witnesses testified to her good character and reputation. We are not informed as to the custodial status of her children from and after the proven period of her prostitution. Her hearing was held March 28, 1962, the Special Inquiry Officer's decision was [fol. 152] rendered October 30, 1962, her appeal to the Board of Immigration Appeals was dismissed March 8,

1963, and her Motion to Reconsider was denied on May 27, 1963. The Motion to Reconsider, verified by her oath, did not rely upon a claim of her children's need for her. Further evidence of her continued good behavior or her children's need for her might move the immigration authorities to withhold the seeming cruelty of tearing a young mother from her children and sending her from the country of which they are citizens. Even if it were our function to appraise the harshness of the deportation of this petitioner, we do not have sufficient facts before us upon which to form our own judgment thereon. We believe that our function ends when we find, as we do, that the Board's underlying order is "supported by reasonable, substantial, and probative evidence on the record considered as a whole * * *," 8 U.S.C.A. § 1105a(a)(4), and that denial of petitioner's Motion to Reconsider was not an abuse of discretion. The Board made out its case and it is not for us to say that petitioner's post-prostitution good conduct, if such had been proved, required forgiveness and the withholding of deportation. We are not at liberty here to proceed on the basis of what we might have done had we been in the position of the immigration authorities.

Giova v. Rosenberg, — U.S. — (1964) held that denial of a Motion to Reopen is a final order, reviewable by this Court even though such review is sought more than six months from the order of deportation, but within six months of denial of a motion to reopen. The respondent Immigration and Naturalization Service contends that inasmuch as the petition for review here was filed more than six months from the date of the order of March 8, 1963, affirming the order of deportation, we are limited to reviewing the discretionary denial of the Motion to Reconsider. See 8 U.S.C.A. § 1105a(a)(1).

Petitioner contends that her Petition for Review requires that we test the Board's action under 8 U.S.C.A. § 1105a(a)(4) which seemingly permits us to consider whether the [fol. 153] underlying order was supported by "reasonable, substantial, and probative evidence on the record considered

as a whole." We need not decide this suggested limitation upon our review powers because, as stated above, we are persuaded that the Board orders must be affirmed on either ground.

It is so ordered.

[fol. 154] Clerk's Certificate (omitted in printing).

[fol. 155]

SUPREME COURT OF THE UNITED STATES
No. 825, October Term, 1965

ELIZABETH ROSALIA WOODBY, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE.

ORDER ALLOWING CERTIORARI—April 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 1090.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stewart took no part in the consideration or decision of this petition.

No. 50

JOSEPH SHEPHERD, FETTERED

CONFESSION AND REFORMATION

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 80

JOSEPH SHERMAN, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[fol. 1]

**BEFORE THE
IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE**

ORDER TO SHOW CAUSE AND NOTICE OF HEARING—

Dated March 14, 1963

In Deportation Proceedings under Section 242 of the
Immigration and Nationality Act

United States of America:

In the Matter of SHERMAN, JOSEPH aliases JOE SHERMAN;
CHOIMA SZORMAN; CHAYEM JOSEF SHERMAN; SAMUAL
LEVINE or SAMUEL or SAM LEVINE, Respondent.

File No. A-2478171

To: Joseph Sherman, 2411 East 3 Street, Brooklyn, New
York.

Upon inquiry conducted by the Immigration and
Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Poland and a citizen of Poland;
3. You last entered the United States at New York, New
York on or about December 20, 1938;
4. You then claimed to be a citizen of the United States.
5. You were not then inspected as an alien by an officer
of the United States Immigration and Naturaliza-
tion Service.

And on the basis of the foregoing allegations, it is charged
that you are subject to deportation pursuant to the follow-
ing provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality
Act, in that, you entered the United States without in-
spection.

Wherefore, You Are Ordered to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 20 West Broadway, New York City; 14 floor; on April 5, 1963 at 8:45 AM, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Immigration and Naturalization Service, I. W. Wroblenski, Assistant District Director for Investigations, New York, New York.

Dated: March 14, 1963
[fol. 2]

Notice to Respondent

The Copy of This Order Served Upon You Is Evidence of Your Alien Registration While You Are Under Deportation Proceedings. The Law Requires That It Be Carried With You at All Times

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's

evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry officer will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which your deportation may be directed pursuant to law; and, upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to physical persecution in any such country.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

Request for Prompt Hearing

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

(date)

Before:

(signature and title of witnessing officer)

Certificate of Service

This order and notice were served by me on March 15, 1963 in the following manner:

by personal service (English) language on Joseph Sherman at 189-14 Linden Boulevard, Queens, N. Y.

Sidney E. Mason, Investigator.

[fol. 3]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

File A-2 478 171—New York, N. Y.

**Transcript of Hearing in Deportation Proceedings—
April 5, 1963**

**MATTER OF JOSEPH SHERMAN also known as: CHOIMA SZOR-
MAN, CHAYEM JOSEF SHERMAN, SAMUEL LEVINE, Respon-
dent.**

Before Special Inquiry Officer Edward P. Emanuel.

[fol. 4] Special Inquiry Officer to Witness:

Q. What is your full name, please?

A. My name is Samuel Rubinsky.

[fol. 5] Miss Binder to Witness:

Q. Now, Mr. Rubinsky, you are here today because a subpoena was served upon you by the Government requiring you to appear today. Is that right?

A. Yes; that's right.

Q. Where do you live, Mr. Rubinsky?

A. I live at 209 Snediker Avenue, Brooklyn.

Q. And how long have you lived at that address?

A. 39 years.

[fol. 6] Q. Do you know the gentleman sitting opposite me?

A. I know him.

Special Inquiry Officer: The Trial Attorney pointed to the respondent in making her inquiry.

Miss Binder to Witness:

Q. How long do you know him, Mr. Rubinsky?

A. I cannot remember exactly.

Q. Did you ever help this man get a passport?

A. I didn't know for what I helped him. I don't remember.

Q. Did you go with him in June of 1937 to a government office where he made an application for a United States passport?

A. I went with him but I didn't know for what.

Q. Did he ask you to go with him?

A. He asked me—Yes, ma'am.

Q. And when he asked you what did he tell you?

A. I don't remember and I don't—I cannot recollect what . . .

Q. When you went with him—did you say you went with him to a government office?

A. Yes.

Q. And what took place when you went with him to the government office?

A. I cannot understand this question.

Q. You say that you went with this gentleman, the respondent, to a government office in 1937. Is that right?

A. That's right.

Q. Did he ask you to go with him?

A. Yes.

[fol. 7] Q. And when he asked you to go with him, do you recall what he asked you?

A. To sign a paper.

Q. Did he tell you why he wanted you to sign a paper?

A. I don't remember.

Q. And you went with him?

A. Yes.

Q. Do you know where you went with him?

A. I don't know.

Q. But you did go to some government office?

A. Yes.

Q. When you went to that government office, what did you do there?

A. When they asked me to sign my name, I signed it.

Q. Did this gentleman sign his name also while you were there?

A. This I don't know—I don't know. I know that I signed it—my name. But I don't know if he signed it.

Q. Did he ask you to go with him to help him get a passport?

A. I don't remember this. He didn't say that.

Q. I show you now an application for a passport which is dated June 8th of 1937, and on the back of it appears a title "Affidavit of Identifying Witness." Now, below this title, there is a signature. Can you tell me whether this is your signature?

A. This is my signature.

Q. The name "Samuel Rubinsky" is your signature.

A. Correct.

Q. Now, the address written under that name, is that in your handwriting?

A. In my handwriting—Yes, ma'am.

[fol. 8] Q. And when you signed your name to this paper, were you asked to raise your right hand and swear that everything in it was true?

A. Yes, ma'am.

Q. And in this affidavit you swear that you have known the applicant personally for six years. Was that true at that time?

A. Was that true—true.

Q. Now, I ask you to look at the photograph on this application. Whose photograph is that?

A. This is Joe Sherman.

Q. And is it a photograph of the Joe Sherman who is here today?

A. Yes. The same.

Q. This is a photograph of him as he appeared in 1937?

A. Yes, ma'am.

Q. Now, Mr. Rubinski, did you see Joe Sherman sign this paper before you signed it?

A. I don't remember. I don't remember.

Q. In this affidavit you say that you know the applicant who executed the affidavit herein to be a citizen of the United States. Did you know whether Joe Sherman was a citizen?

A. I don't know and I didn't read it.

Q. Did you sign this paper before any government officer?

A. I don't understand what you ask me.

Q. When you signed this paper, you say that you raised your right hand—who asked you to raise your right hand?

A. The man by the desk.

Q. Did the man by the desk ask you any other question [fol. 9] when you signed this paper?

A. No, no.

Q. Did he ask you anything when you signed the paper?

A. I signed and that's all.

Q. Did he ask you how long you know Joe Sherman?

A. This what I stated—six years.

Q. Did he ask you how long you know Joe Sherman; or did he ask you how long you know this man; or did he ask you how long you know Samuel Levine?

A. He asked me how long I know this gentleman—this gentleman—Joe Sherman. And I said "Yes, I know him six years."

Q. And did you at that time know that Joe Sherman was claiming to be Sam Levine?

A. I don't know. This I don't know.

Special Inquiry Officer: In his second to the last answer, the witness pointed to the respondent when saying "Joe Sherman."

Miss Binder to Witness:

Q. Mr. Rubinsky, did you know where Joe Sherman lived at the time that you went with him to this government office in 1937?

A. No.

Q. Well, how did he happen to ask you to go with him?

A. Because I knew him.

Q. Where did you know him?

A. I decline to answer on the ground of the Fifth Amendment.

Q. You didn't know where he was living at that time?

A. No.

Q. And did he tell you why he wanted a passport?

[fol. 10] A. I decline to answer on the ground of the Fifth Amendment.

Q. Mr. Rubinsky, you are certain that this man who is sitting opposite me, the respondent in this proceeding, Joe Sherman, is the man who asked you to go with him to the Government office and for whom you signed this document?

A. Yes, ma'am.

Q. And you are certain that the photograph appearing on this document is the photograph of Joe Sherman as he appeared in 1937.

A. Yes, ma'am.

Miss Binder: Mr. Emanuel, at this time I ask that you receive in evidence the application form on which the witness has identified his signature, and has also identified the photograph of the respondent.

Mr. Gollobin: I object to its receipt in evidence as the testimony of the witness is definitely vague and unable to identify many relevant aspects . . . The testimony speaks for itself. I submit no adequate foundation has been laid for its receipt in evidence.

Special Inquiry Officer: Objection overruled. The document previously marked "6 for identification only" is received in evidence as an exhibit bearing that number.

Miss Binder to Witness:

Q. Mr. Rubinsky, in answer to the court order of 1959, did you appear at this office on March 25, 1959?

A. Yes, ma'am.

Q. And did you at that time make a statement under oath before an immigration officer?

A. Yes, ma'am.

[fol. 11] Q. And after you made that statement under oath were you permitted to read and sign the statement?

A. I signed—Yes, ma'am.

Q. And you read it?

A. I didn't read it because I don't read so well—I cannot read so well.

Q. Was it read to you?

A. It was read to me.

Q. And were you at that time accompanied by your attorney, Harry Sacher?

A. Yes, ma'am.

Q. And he signed the statement also?

A. Probably. Yes, yes.

Q. I show you now the record of sworn statement which was taken on March 25, 1959, together with a photograph attached to it, and a photostatic copy of an application for passport, the original of which is now in evidence, and ask you to tell me whether this signature—Samuel Rubinsky—on Page 4 of this statement is your signature.

A. This is my signature.

Special Inquiry Officer: The witness points to the signature, "Samuel Rubinsky" on Page 4 of the document.

Miss Binder: I offer the statement and the exhibits in evidence.

Mr. Gollobin: I object to its receipt in evidence as in no way binding on the respondent.

Special Inquiry Officer: Objection overruled.

The document is received as Exhibit 9.

Mr. Gollobin: Exception.

Special Inquiry Officer: It is not necessary, Mr. Gollobin, that you note your exceptions any time you feel aggrieved. You have an automatic exception.

Miss Binder to Witness:

Q. After you went with Mr. Sherman to this government office, did you see him again?

A. No.

Q. At any time after 1937 did you see Mr. Sherman?

A. No. Until I received the subpoena.

Q. Did you see Mr. Sherman after you received the subpoena?

A. When I received the subpoena, immediately I tried to get in touch with Mr. Sherman.

Q. And you did get in touch with him?

A. Sure.

Q. You informed him that you would be here today. Is that right?

A. Yes.

Q. Did he give you any information? Did he tell you what to say?

A. No.

Q. Well, what kind of a discussion did you have with Mr. Sherman when you notified him about the subpoena?

A. Discussion? We didn't have no discussion.

Q. What did you say to Mr. Sherman?

A. That I received a subpoena and I have to come today here.

Q. And what did he say to you?

A. "Well, the only thing what you have to say is to tell the truth, and that's all." And that's what I am telling.

Q. Mr. Rubinsky, on Page 3 of this statement which is [fol. 13] now Exhibit 9 in the record, you were asked how does it happen that you appeared to sign this application. And you answered: "Well, Joe Sherman asked me a favor—that I should sign for him an application for a passport, and that is all. I do not know Sam Levine and I do not know who is Sam Levine but I know Joseph Sherman, and he asked me a favor. I went to sign but I do not remember anything besides my signature."

A. This is the truth.

Q. Now, according to this answer then, Mr. Sherman asked you to sign for him an application for a passport, and you knew—didn't you—that you were signing for a passport?

A. It's more than 25 years and I cannot recollect and I cannot remember.

Q. Was—But was this statement true when you made it on March 25, 1959, before the immigration officer?

A. This what I said is true.

Special Inquiry Officer to Witness:

Q. Are you saying, Mr. Rubinsky, that this what you said on March 25, 1959, is true—is that what you are saying?

A. Yes, sir.

• • • • •

[fol. 14] Miss Binder to Witness:

Q. Mr. Rubinsky, I show you now passport 439406 which is Exhibit 7 for identification in this hearing, and call your attention to the photograph on Page 4. Will you tell me whose photograph that is.

A. This is Joe Sherman.

Q. And is that a picture of Joe Sherman as he appeared in 1937?

[fol. 15] A. Yes. This is the picture.

Special Inquiry Officer: Mr. Gollobin, do you have anything of the witness?

Mr. Gollobin: No.

Special Inquiry Officer: Very well then.

Thank you very much, Mr. Rubinsky. You are excused. You may leave the hearing room.

Miss Binder: Mr. Emanuel, at this time I ask that you receive in evidence the United States passport 439406 which was issued on the basis of the application which is now in evidence.

Mr. Gollobin: I object to its receipt in evidence as no adequate foundation has been laid at this time.

Special Inquiry Officer: Overruled. The document #7 for identification is received in evidence as Exhibit 7.

Miss Binder: At this time, Mr. Emanuel, I wish to offer in evidence a certificate of admission of alien showing the arrival of Samuel Levine at the port of New York on the

S.S. Ausonia on December 20, 1938. And in connection therewith I wish to submit a certified copy of the manifest of the arrival of that ship. I call your attention to the fact that the certificate of arrival is based upon the information appearing on Page 8, Line 26, of this manifest.

Mr. Gollobin: I strenuously object to the receipt at this time because there is absolutely nothing to connect this Samuel Levine with the respondent. A document is being offered in evidence relating to a Samuel Levine, and whether or not this in any way connects with the previous testimony in this case is entirely obscure. It would seem to me that the Government is trying, by sheer offer of a document without any foundation at all, to establish an [fol. 16] entire case.

Special Inquiry Officer: Overruled. Exhibit 10.

Mr. Gollobin: The Special Inquiry Officer—I have not observed the S.I.O. has even observed this document before making the ruling.

Special Inquiry Officer: The material has been identified to me in her offer. I am familiar from numerous other cases with similar documentation.

Mr. Gollobin: Well, I take very strong exception to the way this ruling has been made, in addition to the ruling itself because the point involved here is extremely material.

Special Inquiry Officer: I desire here and now recorded that after the testimony of Mr. Rubinsky, Exhibit 6 was received in evidence. I desire it further recorded that that exhibit, the application for a United States passport, shows that United States passport # 439406 was issued. That passport is now in evidence. That passport, the last witness stated, bears the photographic likeness of the respondent as of approximately a quarter century ago. That passport is endorsed by the Immigration and Naturalization Service to indicate that the person presenting that document had arrived in the United States December 20, 1938. With knowledge of the facts thus delineated, we made our original ruling with regard to Exhibit # 10.

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[fol. 17] Special Inquiry Officer to Respondent:

Q. May I see the back of your right hand, please?

A. —

Special Inquiry Officer: The respondent complies with the request. We observe that there is a scar on the back of his right hand. We also note that his eyes are blue; that his hair is blond; and that he is . . . When previously standing, we observed that he was approximately 5' 4". [fol. 18] All of which description is set forth in both the application for the passport, Exhibit 6, and the passport itself, Exhibit 7.

[fol. 19]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

File A-2 478 171—New York, N. Y.

MATTER OF JOSEPH SHERMAN also known as: CHOIMA SZORMAN, CHAYEM JOSEF SHERMAN, SAMUEL LEVINE, Respondent.

Transcript of Hearing in Deportation Proceedings—
February 25, 1964

Before Special Inquiry Officer Edward P. Emanuel

[fol. 20]

COLLOQUY RE INTRODUCTION OF EXHIBITS

Miss Binder: Mr. Emanuel, at this time the Service wishes to introduce in evidence a certified copy of a manifest record of the S.S. Aquitania which arrived in Cherbourg, France, on June 22, 1937. It has been certified to before the consul, and bears the name of Samuel Levine as a passenger on that vessel.

Special Inquiry Officer: Show it to the attorney, please.

Mr. Gollobin: I object to its introduction in evidence on the following grounds: No foundation has been laid, and since the Trial Attorney is not herself a witness, I would insist that some person be brought to identify this, who was properly the custodian of this document. It doesn't even come from an American source as such. It comes from, on its face, purportedly a French source, and in time was [fol. 21] passed on by an American source. There is no—I submit there is no basis that might possibly, if this were an American document, and the principle of the custodian of an American record, be entitled to introduction into evidence. There is no such foundation laid here, and there is no witness produced.

Special Inquiry Officer: Miss Binder, do you wish to . . .

Miss Binder: Yes. I wish to call Counsel's attention to the certification on the back of it, certified to by the American consul in France—in Paris, France. With regard to the person who signed this document, and the fact that this was obtained through official sources, is shown by the memoranda which are attached.

Mr. Gollobin: I don't think that obviates the necessity for producing a person under such circumstances. You should consider the statement purely self-serving and not in any way curing the defect in foundation; that is to say, defect in foundation of proof.

Special Inquiry Officer: Miss Binder, there's material on the proffered documentation in a foreign language—in the French language. Is it contemplated that we will be favored with the translation of that?

Miss Binder: Yes, sir. The Service will request a translation of the French material on the document.

Mr. Gollobin: Might I see the portion that's in French on the reverse side?

Special Inquiry Officer: Well, it is both, Mr. Gollobin, on the reverse side and on the left and right portion of the front side of the Cunard document.

Here is all of the material.

Mr. Gollobin: I note that the certification that the Trial Attorney has referred to is simply to the authority of the custodian officer, and therefore in no way reaches the authenticity of a foreign document, which is, as far as I [fol. 22] understand, not entitled to any principle that would apply to the person or custodian in the regular course of an American document.

Special Inquiry Officer: With the understanding that we will be furnished a certified translation of the foreign portion of the document, the objection is overruled. The document is received in evidence as Exhibit 15.

Miss Binder: At this time I wish to introduce in evidence a certified copy of a record from the Department of State in Washington, D. C., submitting a list of American citizens who arrived in Cherbourg during the period January 1, 1937 to September 30, 1937. And I call your attention to the list of such persons who arrived on the S.S. Aquitania at Cherbourg, on June 22, 1937; particularly, the name listed: Samuel Levine, 27, salesman.

Mr. Gollobin: I object to the reception of this document in evidence. It purports to be a document dated in 1937, in which the American Vice Consul in Cherbourg, France, has ascertained the name of an American citizen, suspected of being en route to Spain to join the Loyalist Forces. The basis of the consul's—vice consul's information as to the records of arrival in a French port and the source of his information are absolutely not disclosed, and do not appear on the face of this record. And it would actually have to be a certification of French records rather than American records. If the Service wishes to have this document in evidence, I submit they have to submit somebody who can vouch for the original authenticity of the document, and at the very least submit the officer who compiled this list so he can be cross-examined as to the source of his information, and the basis of its authenticity.

Special Inquiry Officer: Objection overruled. Exhibit 16. [fol. 23] Miss Binder: At this time the Service wishes to introduce in evidence another document, certified by the State Department from the General Records of the Department of State, in which is a telegram received from Barcelona via Paris, dated December 3, 1938, with regard to passports which have been endorsed in all cases or where applications for certificates were made, and I call your attention to No. 245 on this document, which relates to one Sam Levine, passport #439406, dated June 10, 1937.

Mr. Gollobin: I object to its receipt in evidence as there is no foundation laid relating the document to the respondent.

Special Inquiry Officer: Well, do you wish to have your client respond to questions as to whether he is the person referred to herein under the name stated. It is my recollection that previously he had declined to answer interrogations regarding that.

Mr. Gollobin: It's my understanding that the Service has the burden of proof in this matter, since this is an expulsion proceeding.

Special Inquiry Officer: I presume that by your response, your answer is in the negative. Is that correct?

Mr. Gollobin: At this time it is in the negative. And my objection is predicated on the Service's burden of proof.

Special Inquiry Officer: Objection overruled. Exhibit 17.

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[fol. 24] Miss Binder: Mr. Emanuel, at this time, I wish to offer in evidence a certified document from the General Records of the Department of State, which is dated December 10, 1938, consisting of a telegram listing the names of volunteers from Spain who sailed on the Ausonia on that date, together with a report indicating that the persons were examined on December 20, 1938, upon arrival of the vessel in the United States. And I call your attention to the fact that amongst those listed is Samuel Levine.

Mr. Gollobin: I object to its reception in evidence on the ground that no foundation has been laid in relating

this document to the respondent; nor is any custodian of the original document offered for cross-examination, since it purports on its face to say that the persons listed were met with on their arrival, and they obviously would be preferred witnesses in connection with any identification now alleged to be made in relating a particular individual listed on that document as being one and the same as the respondent. Nor is there any reason given for the non-production or non-availability of the persons mentioned in that document who allegedly met the individuals listed on their return to the United States.

Special Inquiry Officer: Objection overruled. Exhibit 18. [fol. 25] Miss Binder: Mr. Emanuel, the Service has a witness to present at this time.

Special Inquiry Officer to Witness:

Q. Sit down now and tell me your name, please.

A. Edward Morrow.

Miss Binder to Witness:

Q. Mr. Morrow, are you a citizen of the United States?

A. I am.

Q. Have you ever used or been known by any name other than Edward Morrow?

A. Yes. I was known as Edward Mroczkowski.

Q. Mr. Morrow, did you serve in the war in Spain sometime between 1937 and 1939?

A. I did.

Q. Do you recall when you left the United States?

A. About June '37.

Q. And when did you return to the United States?

A. December '38.

Q. And where in Spain did you serve?

A. First of all, we had training in a town near Albacete, and from there we went—I was put into the Mackenzie Papineau Battalion of the Abraham Lincoln Brigade. Then

we went up to Quinto. From there we shifted about on the front in Catalonia—I never got into battle there. Then we [fol. 26] went down to Teruel. And then to the first battle of the Ebro. And then, after being wounded, I spent four months at a hospital in Mataro, working there.

Q. Mr. Morrow, do you recognize the person sitting opposite me?

A. I do.

Q. Do you know his name?

A. Well, yes—now—Sam Levine.

Special Inquiry Officer: The person seated opposite the Trial Attorney is the respondent.

Mr. Gollobin: I'm going to object for the record that it was quite improper for the Trial Attorney to, in such a leading way, designate the respondent. She could have simply asked does he recognize anybody in this room.

Special Inquiry Officer: The belated objection is overruled.

Miss Binder to Witness:

Q. Mr. Morrow, can you tell me where you know this person from?

A. From various places around Spain.

Q. Do you recall in what places in Spain you saw him?

A. With pinpoint accuracy—No.

Q. Do you know what he was doing in Spain?

A. I recall he was in the Transportation Corps. He was driving an ambulance, I think, or in transportation . . . he was a driver.

Q. Do you recall any personal contact with him in Spain?

A. No. He was around but I do not recall any personal contact with him.

Q. Do you know over how long a period he was in Spain?

A. Definitely? No.

Q. Can you tell me anything about any particular time [fol. 27] that you may have seen him in Spain?

A. No. This was many, many years ago. I certainly cannot pinpoint any of that—No.

Q. Do you know whether this man traveled to Spain with you?

A. No.

Q. Do you know whether he returned from Spain with you?

A. I'm quite sure he was on the Ausonia with me.

Q. And where did you board the Ausonia?

A. I think it was Havre.

Q. Le Havre, France?

A. Yes.

Q. And was that on or about December 10 . . .

Mr. Gollobin: I object to any leading of the witness.

Miss Binder: Sorry.

Miss Binder to Witness:

Q. Can you tell me about when you boarded the Ausonia?

A. Well, it must have been December '38—it must have been in December of '38.

Q. Incidentally, Mr. Morrow, did you have a passport—a United States passport when you went to Spain?

A. I did.

Q. Did you have to have that passport renewed when you returned to the United States?

A. As a matter of fact, I think I came back without a passport. Some special facilities were made for us at that time.

Q. Do you recall when it was that you arrived in the United States?

[fol. 28] A. Yes. Sometime just before Christmas—around Christmas time, of '38.

Q. Do you recall the names of any other persons who returned to the United States with you at that time?

A. Yes. Victor Tiship (phonetic), Mike Calcagno (phonetic). I can think of their faces, but I can't recall their names.

I'm sorry—Calcagno did not come back with me.

Q. Do you recall any others who may have come back with you?

A. No; not by name.

Q. I show you now what is Exhibit 18 in this record and ask you whether the name Edward Mroczkowski is your name, as listed on page 2 of this document?

A. Yes.

Q. Mr. Morrow, I show you now what is Exhibit 16 in this case, and on page 5 I refer you to the name Edward Mroczkowski, 21, student, listed under the S.S. Aquitania, which arrived in Cherbourg on June 22, 1937. Are you the person referred to?

A. Yes.

Miss Binder: I have no further questions of the witness.

Special Inquiry Officer to Witness:

Q. Mr. Morrow, you say you had known this gentleman over here—the respondent in this case, around Spain. Over what period of time was that, please? Or in what year or years, if you remember?

A. '37—'38, I would say.

Special Inquiry Officer: Thank you.

Mr. Gollobin, you may proceed.

Mr. Gollobin: I ask for a recess—a couple of moments.

Special Inquiry Officer: Recess.

[fol. 29] Mr. Gollobin to Witness:

Q. Where were you born, Mr. Morrow?

A. Jersey.

Q. When?

A. August 16, 1915.

Q. When was your name changed?

A. 1941.

Q. Was this done legally?

A. It was.

Q. Where?

A. Hicksville, New York.

Q. By court order?

A. Yes.

Q. What date in 1941?

A. I don't know. I would have to look that up. It was around May or June.

Q. Can you state the reason why you had your name changed?

Miss Binder: I object to that as being immaterial.

Special Inquiry Officer: Overruled.

Witness: Yes. Mroczkowski is a very difficult name. I tried to get jobs after I finished college with the name Mroczkowski and I tried with the name Morrow—the same identical letters, and the letters from Morrow were answered. I discussed it with my father; my father thought it might be a good idea.

Mr. Gollobin to Witness:

Q. Were you ever arrested?

A. No.

[fol. 30] Q. Have you testified previously before this Service?

A. No.

Q. This is the first time?

A. Yes.

Q. Have you ever appeared before any other government agency?

A. No.

Q. When was the first time you spoke to a representative of the Service?

A. About four months ago.

Q. Do you know on what basis they contacted you?

A. No. I was contacted in the office by Mr. Mason. He said he would like to see me.

Q. Did Mr. Mason identify himself?

A. He did.

Q. And what was his identification?

A. Immigration Service, United States.

Q. Had you ever before that spoken to a representative of the Service?

A. No.

Q. Had you ever before that spoken to a representative of the Federal Bureau of Investigation?

A. No.

Q. Now, at the time they spoke to you, was this at their office or in your home?

A. My office at the Times.

Q. And how long was the conversation?

A. Oh, about forty minutes.

Q. And where was that address where this conversation took place?

[fol. 31] A. 229 West 43 Street.

Q. New York City?

A. Yes.

Q. Is this where you are working?

A. Yes.

Q. What is the name of your employer?

A. The New York Times.

Q. And what is the nature of your work there?

A. I am a reporter.

Q. Since when?

A. Since 1943.

Q. Continuously to now?

A. No. I had a year and a half out for service in the United States Army.

Q. And then you returned to the Times as a reporter?

A. Right.

Q. Now, can you give me Mr. Mason's first name?

A. I'm not positive. I think it's Stanley.

Q. Now, who else was present at the time he questioned you?

A. No one.

Q. Now, just what did he ask you?

A. He asked me whether I was the Edward Mroczkowski who had gone to Spain in 1937, and had I ever lived in Hicksville, and I said Yes. And otherwise developed my history.

Q. Now, were you surprised to know that he knew that you had been in Spain?

A. No.

Q. You were not?

[fol. 32] A. No.

Q. On what basis did you assume that he would know about this?

A. I think I've been examined and re-examined—my history—by many services.

Q. What services do you mean?

A. Well, when I got my Department of Defense card as a foreign correspondent with the Times, I know I had to be cleared.

Q. When was this?

A. This was 1946.

Q. And you stated at that time you had been in Spain?

A. I wasn't questioned by anyone. But everybody knew that. I had never hidden the fact that I had been in Spain.

Q. Who knew it?

A. Well, my employers knew it; my family knew it; everybody around me knew it. I have been proud of the fact that I was in Spain.

Q. And you're proud to be here today?

A. I am doing my duty, I think, as a citizen.

Q. You're proud to be here today?

A. Yes.

Miss Binder: I object . . .

Special Inquiry Officer: Overruled.

Witness: Yes. As a citizen.

Mr. Gollobin to Witness:

Q. Did Mr. Mason take notes while you were talking to him?

A. Yes.

Q. This was during this forty-minute conversation?
[fol. 33] A. Right.

Q. He asked you various questions and then he would at various times take notes on your answers?

A. Right.

Q. Now, did he ask you when you left the country?

A. He did.

Q. And when did you say you left?

A. I thought it was around June or July—June, I think it was, of 1937.

Q. And when did you say you returned?

A. In December of '38.

Q. Did he ask you how you came to go to Spain?

A. I don't think so—No.

Q. Did he ask you what document you had when you left?

A. Yes.

Q. And what did you say?

A. A United States passport.

Q. And to what country was this passport made out to go to?

A. France.

Q. And did he ask you whether you had made a misrepresentation in securing the passport to go to France, when evidently you intended to go also to Spain?

A. No. He did not. Not that I recall.

Q. Did you understand that it was illegal at that time to use a passport made out for France for entry into Spain?

A. I did.

Q. Are you proud of that?
[fol. 34] A. Yes.

Q. You considered that was doing your duty as a citizen?

A. At that time, I did—Yes.

Q. Do you recall other questions Mr. Mason asked you?

A. No.

Q. But you were in there forty minutes?

A. Yes. He showed me some photos then and asked me whether I could identify them.

Q. How many photos were you shown?

A. I think there were two.

Q. Do you recall who the photos were of? Could you identify them?

A. He asked me whether I could identify them as Mr. Sherman.

Q. And what was your answer?

A. No. I could not identify them as Mr. Sherman.

Q. And who was the other photograph?

A. They both were the same person.

Q. And what other questions were you asked?

A. He then asked me whether the name Levine meant anything to me?

Q. What was your answer?

A. I said that rang a bell.

Q. What was the bell it rang?

A. In my mind the name Levine was somewhat like the type of fellow on this photograph.

Q. You didn't recognize the photograph, but you recognized the name?

A. No. I didn't recognize the name. I said there is something familiar about his face; but it's not Joe Sherman, or [fol. 35] whatever the name he used. I don't recall any Sherman like that—it could be Levine—Yes, that rings a bell.

Q. That you could recall?

A. Yes.

Q. And yet you had no contact with Mr. Levine in Spain or the person you knew—or were being told went to Spain under the name of Levine—did you?

Miss Binder: I object to that. There's been no testimony that he was told that this person went to Spain.

Special Inquiry Officer: Overruled.

The last unanswered question is played back from the electronic recording.

Witness: No. I had not had any contact with Mr. Levine since Spain.

Mr. Gollobin to Witness:

Q. That wasn't my question, Mr. Morrow. The fact was you testified that you had no contact with him in Spain.

A. I don't recall direct contact with Mr. Levine in Spain—No.

Q. Now, can you recall any other things you were asked by Mr. Mason?

A. He asked me whether I would be willing to come down to this building and see whether I could identify the man in person.

Q. And you felt you would be proud to do that?

Miss Binder: I object to this as harassment of the witness.

Special Inquiry Officer: Overruled.

Witness: It's not a question of pride; it's a question of duty, too.

Mr. Gollobin to Witness:

Q. Aren't they one and the same? Aren't you proud to [fol. 36] be doing your duty? And wouldn't doing what you consider your duty be something you'd be proud to do?

Miss Binder: I object to this as argumentative, Mr. Emanuel.

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. Now, was there anything else you were asked by Mr. Mason?

A. That is all.

[fol. 37] Q. Have you been a member of the Abraham Lincoln Brigade—a veteran of the Abraham Lincoln Brigade organization in this country?

A. I was for a short period—Yes.

Q. When was that?

A. From when I came back from Spain—I think about—I was a member from about 18 months to two years.

Q. Tell me why you say you are proud of having been in Spain—why?

A. Because I thought we were fighting Fascism at that time.

Q. You still think so?

A. Yes.

[fol. 38] Q. And you believe in fighting Fascism—is that what I gather from your remark?

A. You gather correctly.

Q. And if something were involved, which didn't involve fighting Fascism, but on the contrary helping Fascism, you would be opposed to it?

A. Yes.

Q. Now, you stated you were in the Mackenzie Papineau Battalion.

A. That's right.

Q. Now, will you please tell me how the various brigades or battalions that involved Canadians or Americans and so on were set up in relationship to each other? How many battalions were there?

A. Well, I just recall the Abraham Lincoln, Mackenzie Paps. There were other brigades—11th, 12th, 13th. I just recall these two in the 15th Brigade.

Q. Now, who was the head of your battalion?

A. It was a long time—Robert Thompson.

Q. He's the only one?

A. He's the only one I recall. They had a Political Commissar whose name was Joe Dalet.

Q. What was the setup—were there battalions and a brigade, or how was this arranged?

A. There were battalions within a brigade.

Q. And how many battalions were there?

A. I don't know.

Q. Now, what service did you serve in the Mackenzie Papineau Battalion?

A. I was with the medical group.

[fol. 39] Q. Throughout the time you were there?

A. Yes.

Q. You were not in the infantry, artillery or any combat unit?

A. No.

Q. Now, in the medical unit what did you do?

A. First of all, you try to take care of whatever illnesses there were among the men. You inoculate people.

Q. I mean—were you in a hospital—just where were you?

A. I was—well, for the first eight months, moving around with the unit. Wherever it was, we moved with the unit; we went into battle with them.

Q. Did you, more or less, give emergency first aid? Is that what you mean you performed?

A. That's right. We also went out on the field to get bodies of men and bring them back. We weren't in a hospital; we moved with the unit in connection with its casualties.

Q. And this was throughout the time you were in Spain?

A. The first nine months.

Q. And after that?

A. And then I had a leg wound, and then I was sent to the hospital, and then I was attached to Dr. . . .

Q. Before you go any further—you had a leg wound?

A. Yes.

Q. And you were sent to a hospital?

A. Right.

Q. Where were you sent?

A. I know I ended up in Mataro, to a field hospital, but [fol. 40] I don't recall where it was.

Q. And how long were you in the hospital?

A. I stayed there for the rest of my time in Spain.

Q. How long was that?

A. Another seven or eight months.

Q. Fix the date, please.

A. I can't do that. It was 25 years ago.

Q. You can't fix the date of your own . . . hospital, but you can remember this person that you knew as Samuel Levine being Joe Sherman?

A. I didn't say . . .

Miss Binder: That's not his testimony. I object to that.

Witness: I didn't say that at all.

Special Inquiry Officer: Overruled.

The question was answered simultaneously with the objection.

Mr. Gollobin to Witness:

Q. After you got out of the hospital, what happened? Did you return to the United States?

A. Well, I was returned to the front, and then we were sent back to Barcelona for repatriation to the United States.

Q. How long after you got out of the hospital was that?

A. Oh, I'd say about six weeks.

Q. So you practically went from the hospital—home?

A. Yes.

Q. How many other persons were there on the vessel coming home?

A. Quite a number.

Q. Well, how many would you say?

[fol. 41] A. That I knew personally? About 40.

Q. Well, my question was how many were there on the vessel that brought you home?

A. The vessel was a big vessel—I imagine its passengers—about 300 or 400.

Q. And were there, in your opinion, about that number aboard?

A. I guess so—Yes.

Q. Where were you in that vessel?

A. In a cabin; third class.

Q. And the various other portions of the vessel were occupied—the different quarters of the vessel, by different persons coming back from Spain. Is that right?

A. Yes. Quite a number were—Yes.

Q. Were all the passengers on that vessel, those, like yourself, coming from Spain?

A. That I do not know.

Q. In connection with a person you say you knew as Samuel Levine there, were you introduced to him?

A. I think so—Yes.

Q. When do you think so?

Miss Binder: I don't understand the question. May we have a clarification?

Mr. Gollobin: I think the witness hasn't asked for it, and I think he is answering the question.

Witness: In a group of men, you get to know everybody. And he was in the group—Yes.

Mr. Gollobin to Witness:

[fol. 42] Q. Now, was he in your battalion?

A. I think when we were training—Yes.

Q. Where were you training?

A. North of Albacete.

Q. Aren't you inventing that? You didn't mention that before—did you, Mr. Morrow?

A. What?

Q. In connection with training—when you were asked by the Government Trial Attorney about knowing him. You said you met him in connection with his being in the transportation corps.

A. Yes. That's right.

Q. But now you're throwing in that you met him in training—or you think so. Do you know so?

A. I'll go so far as to say that now—Yes.

Q. Your memory is now being improved. Is that . . .

A. Under your questioning, definitely.

Q. I see. What else can you remember now that you haven't testified before, since you seem to say your memory is improving?

A. —

Miss Binder: I object to the question.

Special Inquiry Officer: Overruled.

Witness: You will have to ask me the questions.

Mr. Gollobin to Witness:

Q. Well, so far you can't think of anything else?

A. That's right.

Q. I'll try to see how much I can improve your memory: [fol. 43] Now, where did you train?

A. At this town north of Albacete.

Q. Now, what was the name of the town?

A. I can't recall.

Q. How many men were training there?

A. There must have been at least 200.

Q. Were you all quartered in the same place?

A. No.

Q. Now, were you all being trained for the same thing?

A. No. Some of them were not being trained. Yes. At that town we were all being trained to become infantrymen.

Q. Now, you have testified that you understood that this gentleman here you claim you knew as Samuel Levine, you knew him in the Transportation Corps.

A. Yes. Later on . . . that's where I saw him . . .

Q. And yet all these people there who you met with were being trained in the infantry.

A. Well, I was being trained in the infantry; I didn't end up in the infantry.

Q. Was that because of your request?

A. No.

Q. Did you ever have any conversation with him there—this person you are identifying today?

A. I'm quite sure I had conversations with him at one time or another.

Q. Oh, you now remember that?

A. I'm quite sure I did.

Q. What does your quite sure mean? You either remember or you don't—don't you?

A. Right now, I'll say I don't know whether I had conversation with him.

Q. You recede from that?

A. Yes.

Q. How many men did you say were being trained there?—

A. Oh, I think about 200.

Q. Is that what you just said a moment ago—the number?

A. I don't know. I think so.

Q. A moment ago, I understood you to say there were about 400. In other words, between a moment ago and now, your memory improved from—reduced the number by a half.

Miss Binder: I object to that. That was not the testimony of the witness, Mr. Emanuel, as the record will reflect.

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. Where were you trained? What was the name of the place?

A. I just told you some town north of Albacete.

Q. And how many men in general were being trained there?

A. 200, as I recall. Albacete was the headquarters of the International Brigade at that time, but I don't know how many men they had there.

Q. Now, what was the purpose of the Transportation Unit—what did they do?

A. Well, you have some attached to battalions who bring up food and other supplies; medical transportation boys who drove the ambulances.

Q. And what kind of transportation do you claim Mr. Levine, the person you know as Samuel Levine, was in?

A. I didn't claim. I just—I think he was in transportation, a segment of the brigade.

Q. You're not sure?

A. No.

Q. What kind of transportation you claim that this person you knew as Samuel Levine was in, since you testified there was more than one kind: delivery supplies, doing various other military duties.

A. My recollection of that is hazy, but I recall this person being around whenever there was some kind of delivery being made to the battalion.

Q. Now, there were many kinds of deliveries being made to the battalion. Isn't that right?

A. Yes.

Q. There is military supplies, food, hospital supplies, et cetera. Isn't that so?

[fol. 46] A. Yes.

Q. Were they all delivered by the same driver?

A. No.

Q. And yet you say he was around whenever there was a delivery being made?

A. Not whenever—always around. On occasions, I saw this gentleman when there was transport around.

Q. In other words, when—you just testified a moment ago that whenever deliveries were being made, you saw this gentleman around. Isn't that what you just said?

A. Sometimes deliveries were made and he wasn't around.

Q. So how many times was he around? Now, you say he wasn't around there all the time when deliveries were being made.

A. Just frequently enough to thrust himself upon my memory.

Q. Now, what time of the day were deliveries made?

A. Any time—day or night.

Q. Were wartime deliveries made during the day?

A. Sometimes; depending upon where you were.

Q. Well, wasn't there some provision made to deliver at night because of fear of bombardment by planes of the Franco forces?

A. I said depending upon where you were. If you were in the secondary lines, you didn't . . .

Q. I must say, Mr. Morrow, this has been written about in the public press, also in books, that in connection—I ask you: Is it not a fact that military deliveries to the forces in Spain were made at night?

A. They were sometimes made in the daytime.

Q. Was that the common practice?

[fol. 47] A. No.

Q. Wasn't that where in a case maybe there was an emergency situation they delivered during the day? And the general practice was to make deliveries at night because of military safety?

A. I would say—Yes.

Q. Now, you say, the deliveries therefore made during the day were the exceptional ones. Is that right?

A. That's right. Except when you were in secondary lines or back further.

Q. Well, were you in the secondary lines?

A. Yes. The Mackenzie Papaneaus weren't in action all the time.

Q. And in your secondary line, would you be getting military supplies, or would you simply be getting food?

A. You could be getting both because you sometimes were training and . . .

Q. So how long were you—I'm sorry. Continue.

A. . . . you had to get new weapons sometimes, and naturally there were military supplies coming in, too.

Q. And how long were you in the first line? For what period of time were you there?

A. Well, let's see. At Quinto about ten days. At Teruel about 32, or about a month. I think I was near Masdelasmatas another 25 or 30 days.

Q. And the rest of the time you were in the secondary line?

A. Yes. Or in the hospital.

Q. And how far behind the lines was the secondary line?

A. I wouldn't know.

Q. Were you ever bombed in the secondary line?

A. Yes.

[fol. 48] Q. So military precautions had to be taken in the secondary lines, too. Didn't they?

A. Yes. When planes were overhead.

Q. And there was the danger of bombing in the secondary line?

A. Yes.

Q. So wasn't the practice in delivering supplies to the second line pretty much as to the first line, since you faced military hazards in the secondary line from bombing, as well?

A. No.

Q. Now, you testified that supplies were delivered by different units of a transportation corps since you delivered different kinds of supplies: some were military for armaments, some were food, and so forth. Were these different drivers?

A. Yes.

Q. Now, how many times do you claim you saw Mr. Levine?

A. I don't know how many times I saw Mr. Levine.

Q. Could it be one time?

A. No. More than once.

Q. Was it ten times?

A. More than that, too.

Q. Was it twenty times?

A. At least.

Q. Well, how often were supplies delivered?

A. Not being a quartermaster, I don't know.

Q. Well, you were there—weren't you?

A. Yes. But sometimes I slept.

[fol. 49] Q. Well, I'll allow you for the time you slept. But for the time you were awake, which I assume was part of the time, how often were they delivered?

A. Depending if Solly Wellman (phonetic) could get his trucks through, he'd come up three times a day.

Q. The same supplies, or different supplies?

A. These were the food supplies I'm talking about now.

Q. What do you claim he was delivering?

A. I don't claim he was delivering anything. I just have the general impression and know that I met this man in Spain.

Special Inquiry Officer: Mr. Gollobin, when you say "he," do you mean the respondent?

Mr. Gollobin: Referring to the respondent—Yes.

Special Inquiry Officer to Witness:

Q. Mr. Morrow, when you answered the last question, were you referring to the gentleman seated over here, the respondent in this case?

A. Yes.

Mr. Gollobin to Witness:

Q. Now, did the transportation come right to the line where you were?

A. No. Depending upon where the line was. At Quinto, Yes; you could come up right to—at night you could come up to about fifty yards behind the line.

Q. And during the day?

A. And during the day, No. They didn't come up on that road. In Teruel, they came through the streets of Teruel in daytime, and close to the line.

Q. Well, so for the time that you were awake, about how many times do you claim you saw the respondent?

[fol. 50] A. At least 20 times.

Q. What were you doing at the time you saw him—you claim you saw him?

A. Various things. I could have been hanging around the ambulance; or—in an army, you do many things. I don't recall exactly what I was doing.

Q. I'm not asking you to speculate, Mr. Morrow. You tell me what you could have been doing. I'm asking you what you were doing. You are testifying under oath what you saw and did; and not you could have, or speculating what you could have seen.

Miss Binder: I object to this as being argumentative on the part of the attorney.

Special Inquiry Officer: Please proceed, Mr. Gollobin.

Witness: I'm here testifying solely that I knew this man in Spain. That is all. How I—What you are trying to do now, I don't know. But I came down here to say whether I knew this man or not, and I did. You are apparently trying to discredit me—right?

Mr. Gollobin to Witness: If you want the answer, I think you are discredited. That's vis-a-vis if you wanted me to answer your question . . .

Witness: Right.

Mr. Gollobin: You are testifying here under oath and you have no memory . . .

Special Inquiry Officer: Mr. Gollobin, will you please proceed with your cross-examination, if you have anything further to present in that manner.

Mr. Gollobin: I do.

Mr. Gollobin to Witness:

Q. Were you introduced to Mr. Levine?

Miss Binder: May I ask Counsel to fix the time.

Mr. Gollobin to Witness:

[fol. 51] Q. At the time you were in Spain were you ever introduced to this person you say you knew as Samuel Levine?

A. I presume I was—Yes.

Q. Mr. Morrow, I again say to you you are not here to speculate or to presume. You are here testifying to your direct knowledge—were you or weren't you—that's the question. You are testifying under oath—remember.

A. I do not recall being introduced.

Q. If you were not introduced to him, how did you know his name?

A. There are many people I have not been introduced to whose names I know.

Q. Well, on what basis did you know his name if you weren't introduced to him?

A. Probably—undoubtedly, some of the other men in my unit told me.

Q. You say "probably"; again I say you are testifying under oath to what you know—not probably. Do you realize that this is a serious proceeding in which a person's right to be and remain in the United States is involved. Do you understand that?

A. I do now—Yes.

Q. The Government cannot proceed on—is not claiming they're going to proceed on probability. They have to proceed on facts. So, you don't recall being introduced to this man. Is that correct?

A. That is right.

Q. About how many fellow members of the battalion and other brigades did you meet in Spain?

A. At least 100.

Q. I don't mean meet personally and know personally, but I mean have contact with in any way.

[fol. 52] A. I don't know. I don't know how many people I meet in the ordinary course of life.

Q. Could it be that you had contact there with several thousand over the period of time that you were there, in one way or another?

A. In one way or another—Yes. I had contact with 2,000 people.

Q. Do you have any memoranda from that time or notes?

A. Yes.

Q. You have them still in your possession?

A. Yes.

Q. Do they relate to your service in Spain?

A. Yes.

Q. Do they mention this gentleman's name?

A. I don't know.

Mr. Gollobin: I ask that these notes be made available.

Witness: These were letters to my wife. And I will not give them to you for the purpose of this proceeding.

Mr. Gollobin: My request stands.

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[fol. 53]

**Transcript of Hearing in Deportation Proceedings—
June 25, 1964**

**BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE
UNITED STATES DEPARTMENT OF JUSTICE**

File A-2 478 171—New York, N. Y.

**MATTER OF JOSEPH SHERMAN also known as: CHOIMA SZOR-
MAN, CHAYEM JOSEF SHERMAN, SAMUEL LEVINE, Respon-
dent.**

Before Special Inquiry Officer Edward P. Emanuel

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[fol. 54] Miss Binder: Mr. Emanuel, I should like at this time to call as a witness Mr. Mason, the investigator.

Special Inquiry Officer to Witness:

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Q. You may sit down. What is your full, real name, please.

A. Sidney E. Mason.

Miss Binder to Witness:

[fol. 55] Q. You are an employee of the United States Immigration and Naturalization Service?

A. I am.

Q. And what is your title?

A. I am an investigator.

Q. Do you know the gentleman who is sitting diagonally opposite you?

A. I do.

Q. And how do you know him?

A. The gentleman is Mr. Sherman. I know him by virtue of the fact that I was instructed to serve an order to show cause, which instituted the deportation proceedings which are taking place today.

Q. And have you also acted as an investigator in this case?

A. I have.

Q. Now, in the course of your investigation in this matter, did you have occasion to interview a gentleman by the name of Mr. Morrow?

A. I did.

Q. Do you recall when it was that you interviewed Mr. Morrow?

A. Yes. The interview took place around the early part of April of 1963.

Q. And where did you interview Mr. Morrow?

A. I interviewed Mr. Morrow at his place of employment which is the New York Times Building located on West 43rd Street in Manhattan.

Q. And about how long did that interview take?

A. Approximately 30 to 35 minutes.

Q. And during the course of your interview with Mr. Morrow, did you take notes?

A. I did.

Q. Did you record the questions you asked Mr. Morrow?
[fol. 56] A. No. I did not.

Q. Did you record verbatim the answers Mr. Morrow gave you?

A. No. I did not.

Q. Do you recall the nature of the notes which you took at that time?

A. Specifically, No. I do not recall the exact nature of the notes.

Q. Do you recall specifically what information you developed by interviewing Mr. Morrow?

A. Well, generally, I would say Yes.

Q. After the interview was concluded, Mr. Mason, you left the office of Mr. Morrow with some notes. Is that correct?

A. I did.

Q. And what did you do with those notes?

A. When I returned to the office later that day, I transposed those notes into a more rhetoric fashion; it was made into the form of a draft report of the interview. This was done in my own hand, and made in preparation for a report which would be written at a subsequent date.

Q. And did you at a subsequent date write such a report, or dictate such a report?

A. I did.

Q. And do you recall when it was that you wrote your report?

A. Yes; approximately the latter part of April or the early part of May, last year.

Q. And was that a report exclusively of your interview with Mr. Morrow?

A. No. The report included material other than that that concerned itself with the interview with Mr. Morrow.

Q. And after you prepared your report, what did you do with the notes?

[fol. 57] -A. I destroy them.

Q. And why did you destroy the notes?

A. Because I had no further use for the notes. I had rechecked the notes against the report, and inasmuch as they were represented to be correct, I destroyed the notes.

Q. Did your report contain all the information which you had noted in reports of your interview with Mr. Morrow?

A. Yes. It did.

Q. Mr. Mason, I show you now a classified report which consists of nine pages. Will you tell me whether this report contains the information which you developed from your interview with Mr. Morrow?

A. Yes. It does.

Q. And in what portion of this report is the information regarding your interview with Mr. Morrow contained?

A. The information is reflected on pages 6 and 7 of the report.

Q. Now, Mr. Mason, will you tell me, please, do you, in the course of the job as an investigator—do you retain notes of interviews in the course of the investigations which you make?

A. No. It is the normal practice to destroy the notes after they have been reduced to writing in a report.

Q. Do you ever retain notes in any case?

A. Yes. There are occasions.

Q. On what occasions do you retain the notes?

A. That would occur when, in the course of an interview, information is developed which leads to a statement in writing, and in response to specific questions, and if it's very material, and if a statement is read and signed by the [fol. 58] individual who makes it, that becomes an important document, and eventually a part of the file, and is retained.

Q. Did you have Mr. Morrow sign any statement when you interviewed him?

A. No, ma'am.

Q. Did you record his answers verbatim?

A. No. I did not.

Miss Binder: Mr. Emanuel, at this time I offer for your inspection the report which Mr. Mason has identified, as well as a copy of that portion of it which relates to Mr. Mason's report of the interview with Mr. Morrow. This is a classified report and contains a lot of material which has no relationship to the witness in this case, Mr. Morrow. I am prepared to have Counsel see the portion of the re-

port which relates to Mr. Mason's interview with Mr. Morrow. And I ask that you rule as to whether or not the rest of the material on this classified report is relevant to the testimony of the witness.

Special Inquiry Officer: Before reviewing the material, Miss Binder, am I correct in understanding that you are willing to furnish—to show the excised copy of the report to the attorney, but not the original material. Is that correct?

Miss Binder: That is correct.

Special Inquiry Officer: I have compared the two. The original is now marked 18 A for identification only; the other 18 B for identification only. The excised portion does not relate to the witness's interview with Mr. Morrow; except on page 1 of 18 A for identification there is a synopsis of approximately six lines as to the interview by the witness of Mr. Morrow. That has not been reproduced on [fol. 59] the excised document. Both are now returned to the Trial Attorney.

It may be thought that Mr. Gollobin may wish to be furnished with document 18 B for identification.

Miss Binder: I ask that document 18 B for identification be received in evidence, Mr. Emanuel, and I will show it to Counsel.

Mr. Gollobin: I would request that the portion the Special Inquiry Officer referred to of the synopsis of Mr. Mason be made available to me.

Special Inquiry Officer: Will it be satisfactory, Mr. Gollobin, that I read it to you now, and it will be recorded as part of the record? Will that be satisfactory?

Mr. Gollobin: Yes, sir.

Special Inquiry Officer: The portion referred to reads:

"EDWARD A. MORROW (MROCZKOWSKI) interviewed. He made a vague identification of the person represented on the passport photograph exhibited to him and seemed to recall that he saw that person with a transportation unit in Spain during the Civil War. He was willing to person-

ally observe SUBJECT to convince himself before he could make a more positive identification."

The document # 18 B for identification is received in evidence as an exhibit bearing the same number.

Miss Binder to Witness:

Q. Mr. Mason, before you wrote your report which is now Exhibit 18 B, how many times had you personally interviewed Mr. Morrow?

A. This was the sole occasion that I personally interviewed him.

Q. And that, according to the report, took place on April 9, 1963.

A. Yes. I believe on or about that date.

Q. Now, in your report you refer to "Morrow was recontacted on April 18th and April 25th 1963." Do you recall what the nature of these recontacts were?

[fol. 60] A. Yes. I do.

Q. Will you tell us how you recontacted Mr. Morrow on April 18th and April 25th, as indicated in this report?

A. Inasmuch as Mr. Morrow had indicated to me that he was going to go back home and check his notes or perhaps some letters he had written, he wanted to make sure that he might be able to get more positive information to justify his then opinion that the photographs may relate to the individual he had in mind. I thereupon recontacted him on the first occasion, which was approximately a week later, and . . .

Q. How did you recontact him?

A. Telephonically.

Q. You spoke to him on the telephone then on April 18th. Is that correct?

A. That is correct.

Q. And was the recontact of April 25th of the same nature?

A. Yes. It was.

Q. And your only personal contact with Mr. Morrow, that is vis-a-vis, prior to writing this report, was on one

occasion and that on April 9, 1963, as reported. Is that correct?

A. That is the only time I interviewed the gentleman.

Q. Prior to writing . . .

A. Prior to writing the report.

Miss Binder: I have nothing further of the witness.

Mr. Gollobin to Witness:

Q. May I ask you, Mr. Mason, did you show Mr. Morrow, when you interviewed him on April 9th, certain photos?

[fol. 61] A. I showed him a photograph—Yes; or two.

Q. How many did you show him?

A. Two.

Q. Which photographs did you show him?

A. I showed him two photographs—both were the same—one was a smaller edition, and one was a more blownup picture.

Q. Do you have those photographs?

A. I do not have them with me. They are in the file.

Q. When you say "in the file," do you refer, or would you know if they are in the file before the Special Inquiry Officer?

A. I do not know. They were placed in the file.

Special Inquiry Officer to Witness:

Q. Mr. Mason, are you referring to the photograph which was in the passport of the respondent? Is that what you are referring to?

A. Yes, sir. I am referring to a passport photograph which was taken from the passport.

Q. Is this the photograph you are referring to, Mr. Mason? I show you photograph which is a part of Exhibit

7.

A. Yes. This is the photograph I showed to Mr. Morrow.

Mr. Gollobin to Witness:

Q. Is this photograph a photo with glasses?

Miss Binder: Mr. Emanuel, the photograph speaks for itself. I object to Counsel's question.

Special Inquiry Officer: Let me see the photograph, please.

Undeniably, the photograph does not show the subject thereof wearing glasses. The respondent is now wearing glasses.

[fol. 62] Mr. Gollobin to Witness:

Q. Mr. Mason, do I understand that since April 9, 1963 until today, you have not seen Mr. Morrow?

A. That is not what I said. I was asked how many times I had seen him prior to the writing of my report. And I so stated: once, personally.

Q. After writing your report did you see him?

A. Yes. I did.

Q. How many times?

A. Two occasions.

Q. What dates?

A. Offhand, I can't give you the exact dates, but the approximate dates: I saw Mr. Morrow for the second time on the day of the scheduled hearing which was held in February of this year. On that day, I met Mr. Morrow in the lobby of the premises at 20 West Broadway, pursuant to a telephone call I had made to him a previous day, asking him to come to the hearing. And he said he would appear on that day. I escorted Mr. Morrow upstairs to the 14th floor of this building, since I was the only person who had met him on a previous occasion and would know him.

Q. Did you have him at that time meet the respondent?

A. No, sir. I did not have him meet the respondent.

Q. He simply waited with you preparatory to testifying later that morning. Is that correct?

A. Mr. Morrow came to the office just around the time when I think there was a short recess of this hearing. Mr. Sherman and, I believe, you, and, I think the lady sitting over there, to the best of my recollection, was seated at that time in the waiting room, or the reception room of [fol. 63] this floor. Mr. Morrow, when he came up with me, was placed in a certain position, which was directly in front of where Mr. Sherman was sitting. And at that time he observed, and was in a position to observe Mr. Sherman.

Special Inquiry Officer: In referring to the "lady sitting over there," the witness was referring to one of two ladies who had accompanied respondent into the hearing room.

Witness: To the best of my recollection, I believe that there were two ladies present that day. I think both of them were there.

Mr. Gollobin to Witness:

Q. And it was—was it on this basis then that you offered him as a witness?

Miss Binder: I object to this, Mr. Emanuel. Mr. Mason did not offer him as a witness. It was the Trial Attorney who offered him as a witness.

Special Inquiry Officer: Sustained.

Mr. Gollobin: May I then inquire, since the Trial Attorney is also present, that it was on this basis that the Witness Morrow was offered.

Miss Binder: Mr. Morrow indicated, after observing the respondent, that he could identify him, as he testified later in the record, and I decided at that point, since he was present, to put him on as a witness.

Mr. Gollobin to Witness:

Q. Now, am I to understand that you asked the witness everything he knew when you interviewed him on April 9th, and that this report fairly and correctly covers in substance what you asked him and he answered?

A. Yes. It is fair and correct representation of the interview.

Q. There is nothing that you have added or subtracted?

A. Nothing.

Q. Prior to your phoning Mr. Morrow on April 9th—[fol. 64] contacting Mr. Morrow on April 9th, did you know him?

A. No. I did not know Mr. Morrow prior to that day.

Q. On what basis then did you contact him?

Miss Binder: I object to that, Mr. Emanuel.

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. Can you tell me what was stated by Mr. Morrow on April 18th?—when you phoned him.

A. Well, the substance of that reflected, I believe, in my report, and I can't remember the exact words he said. It was a very short conversation. I have a recollection of that. The substance was, to the best of my recollection, that he did not get a chance or an opportunity to look for the material he wanted to check over to see if he had the material. It was a very short conversation. I told him that I would call him back the following week. As a matter of fact, I specifically recall that he said, "It would be a good idea to do so." Because the following week, I believe he said, was the Easter vacation and he was going to be home, and it would give him a better chance to look around for his material.

Q. So, actually whatever information you got was derived from the second conversation with him on April 26th.

A. No. The information I got on April 26 supplements the information that he gave me, and I just made a short note of that and I reflected that on the bottom of my draft notes which I subsequently dictated almost word for word, or word for word in my final report.

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[fol. 65] Special Inquiry Officer to Witness:

Q. You may sit down. Please again tell us your name.

A. My name is Edward Morrow.

Mr. Gollobin to Witness:

Q. Have you brought your notes with you today?

A. I have not.

Mr. Gollobin: I ask that this hearing be deferred until the witness brings his notes.

Mr. Morrow, Witness: I looked for those notes and they are no longer available. Apparently my wife thinks she threw them out when the cellar was flooded three years [fol. 66] ago.

Mr. Gollobin to Witness:

Q. You've testified that you spoke to Mr. Mason some four months ago—that is, four months prior to the last time you appeared here. Is that correct?

A. Yes.

Q. Did you tell Mr. Mason that you had certain notes?

A. I told him I thought I had some letters at home—Yes.

Q. And this was after this so-called flood?

A. This was after the flood—Yes.

Q. What happened to the notes then that you had in mind when you spoke to Mr. Mason?

A. Those were the notes—the same thing—these letters I had written to my wife.

Q. Well, didn't you know then, after talking to Mr. Mason, and looking for them, that those notes weren't available?

A. No. I did not.

Q. After talking to Mr. Mason didn't you look for those notes?

A. Not—in a haphazard fashion—not very thoroughly. This time I asked my wife, and I went up the attic.

Q. So when you told Mr. Mason you had looked for them, you really hadn't looked for them. Is that right?

A. Yes, I had looked for them but in a haphazard way.

Q. And what do you call a non-haphazard way?

Miss Binder: I object to this as harassment, Mr. Emanuel.

Special Inquiry Officer: Overruled.

Witness: I went up to the attic, and I didn't think it [fol. 67] was of so much importance at that time until I came here and realized the importance and realized the importance of the case.

Mr. Gollobin to Witness:

Q. Now, after talking to Mr. Mason did you find any notes?

A. No.

Q. Well, did you tell Mr. Mason that you had looked at any of your notes?

A. I don't recall having said that— No.

Q. Now, if Mr. Mason said you had, would his memory be better than yours?

Miss Binder: I object to that. There is no indication that there was any statement of such . . . by Mr. Mason.

Special Inquiry Officer: Overruled.

Witness: Well, if Mr. Mason said that I'd looked at notes, would his memory on that be better than mine? I don't know whether his memory is better than mine or not.

Mr. Gollobin to Witness:

Q. Well, if his memory is different than yours, and opposite of yours, which would you say is the truth?

A. —

Miss Binder: I object to this, Mr. Emanuel. This is pure conjecture and I suggest that Counsel read to the witness what Mr. Mason did say.

Special Inquiry Officer: Overruled.

Witness: What is the question?

Special Inquiry Officer: We will repeat the electronic recorder.

Witness: The only thing I recall having told Mr. Mason is that I thought I had some letters at home and I would refer to them. I went and searched for them in the attic, but I did not refer that search to my wife. This time I did. [fol. 68] There were no notes that I had—just letters.

Mr. Gollobin to Witness:

Q. But the point is: Did you at that time refer to letters or notes or whatever you want to call them?

Miss Binder: I object to Counsel not fixing the time. When he says "at that time," what time is he talking about?

Mr. Gollobin to Witness:

Q. At the time you answered Mr. Mason on April 9—when you spoke to him and he asked you about these notes.

A. If I recall, I tried to find notes and I couldn't find them—that's all.

Q. Now, Mr. Mason says that you stated that you had made a search of your notes and there was nothing additional in these notes. Was Mr. Mason correctly telling what you had said?

Miss Binder: I object to that. It does not reflect what Mr. Mason said. Counsel is referring to the report and I would suggest that he read from the report when he is questioning the witness.

Special Inquiry Officer: Sustained.

Mr. Gollobin: I have done so.

Miss Binder: You have not, sir.

Special Inquiry Officer: The attorney has presented to me Exhibit 18 B. We will now show it to the witness and...

Mr. Gollobin: I object to showing the entire statement at this time to the witness.

Special Inquiry Officer: Very well. Then I will read the portion which appears to me to be the matter concerning which you are inquiring.

Mr. Gollobin: . . . refer to one sentence in paragraph—the last paragraph.

[fol. 69] Special Inquiry Officer: Recess.

Special Inquiry Officer to Witness:

Q. In the document which is now in evidence as Exhibit 18 B, Mr. Morrow, Mr. Mason reported that on April 9, 1963, you were interviewed. After stating additional things, Mr. Mason continued his report with the assertion that you were recontacted on April 18 and April 25, 1963. Mr. Mason reports that you advised that you could come up with nothing additional after you made a search of your notes. Do you understand?

A. Yes, sir.

Miss Binder: Just a minute, Mr. Emanuel. May we also point out to the witness that Mr. Mason in referring to recontacting him on April 18th and April 25th has testified that this recontact on both occasions was by telephone.

Special Inquiry Officer: Yes. That is correct.

Mr. Gollobin: I request that the witness answer the question of record.

Special Inquiry Officer: Certainly.

The last unanswered question will now be played back on the electronic recording.

Witness: Well, I told Mr. Mason I searched the notes and I found—I think I found—I'm sure I found a couple of postcards. But that's all I found in the attic and I could find nothing to add to what I told him before. That is what I meant by notes.

Mr. Gollobin to Witness:

Q. Mr. Morrow, did you testify as to your having these notes the last time I cross-examined you?

A. I believe I had them— Yes.

[fol. 70] Q. And did you say these were letters to my wife and I will not give them to you for the purpose of this proceeding?

A. I did.

Q. . . . that correctly reflect your feelings?

A. If I had the notes or letters now I would not produce them for the purpose of this proceeding. But I don't have them. The situation has changed.

Q. Isn't it a convenient invention that you have now made because you don't want to produce these—as you say they are letters to your wife?

A. It is not a convenient— No. It is not a convenient . . .

Q. In other words, you are testifying you have no way of possibly refreshing your recollection as to the events in Spain, based on any personal materials that you have?

A. Yes.

Q. And you have not been able, since you left there, to so refresh your recollection in connection with this proceeding?

Miss Binder: I object to this, Mr. Emanuel. This is not part of the testimony of this . . .

Special Inquiry Officer: Sustained.

Mr. Gollobin to Witness:

Q. At the time you talked with Mr. Mason, had you looked at the material that you are now referring to?

A. No.

Q. Had you any inclination that you were ever going to be called as a witness in a proceeding?

A. No.

[fol. 71] Q. When did you speak to Mr. Mason the first time?

A. When he came to my office—early '63.

Q. You testified here on February 25, 1964. Do you recall that?

A. Yes. I do.

Q. And do you recall when you were here previously, you were asked the following question: "When was the first time you spoke to a representative of the Service?"

Do you recall your answer?

A. No. I do not.

Q. Do you recall when you testified here the last time?

A. Yes. February, this year. I don't recall . . .

Q. You don't recall the date exactly?

A. No.

Q. You don't recall though what you said at that time.

A. I presume I said the same thing I'm saying now: Sometime early in '63 when he came to my office.

Q. Well, I read from the record that your answer was: "About four months ago."

[fol. 72] A. I was mistaken—that's all. It didn't make such an impression on me.

• • • • •

Q. Now, when you were questioned by Mr. Mason, what did you tell him on April 9, 1963—what did you tell him as to what you knew about the person that he was questioning you on?

A. Well, as I said, if I recall, he showed me a couple of pictures and he asked do I know this person under a certain name . . . name was Sherman. I said, "No. I don't know him. I don't recall a person by the name of Sherman who looks like this."

Q. Did he identify this individual in any further way?
[fol. 73] A. No. He later on—well, from the line of questioning, when he asked me had I been to Spain—was I ever . . . , I presumed what the line of questioning was going to be, and then he asked could I identify Sam Levine, and I said No, I couldn't, but by his looks, it rang a bell in my mind.

Q. When you say it "rang a bell," is that when you could identify him?

A. It appeared to me that that was a photograph of Sam Levine— Yes. The person I had known as Sam Levine.

Q. Now, I'm reading to you from Mr. Mason's statement as follows—paragraph 2: "When asked if the name Joseph or Joe Sherman or Samuel or Sam Levine had any significance to him, or if a person bearing such name had been on the S.S. Aquitania trip abroad in June 1937—or on the S.S. Ausonia return voyage in December 1938, he stated that he could not recognize the name." Did you tell Mr. Mason that?

A. Yes. I told him that I did not recognize this man as Sherman.

Q. And did you also tell him that after he had mentioned the name Sam Levine you did not recognize the name?

A. I do not recall saying anything on that.

Q. I'm not asking you whether you recall. I'm asking you whether this corresponds to the truth.

A. Well, will you read again what Mr. Mason said—I'll try . . .

Q. I have just read it to you. Can you recall now on the basis of what I have just read to you or not?

A. No.

Q. Now, Mr. Mason did state in this report, based on his interview with you, that you stated, after hearing the name Joseph or Joe Sherman or Samuel or Sam Levine—that you stated you could not recognize the name. Was that a [fol. 74] true report by Mr. Mason?

A. I guess, yes.

Q. Do you recall your testimony on this question when you were here in February of this year?

A. No. I do not.

Q. You don't recall what you were asked and answered?

A. No. I do not.

Q. I read from page 45: He (referring to Mr. Mason) asked me whether I could identify them (the photos) as Mr. Sherman—that's your answer.

Question: "And what was your answer?" "No. I could not identify them as Mr. Sherman."

"And who was the other photograph?" "They both were the same person."

"And what other questions were you asked?" "He then asked me whether the name Levine meant anything to me."

"What was your answer?" Answer: "I said that rang a bell."

Question: "What was the bell it rang?" Answer: "In my mind the name Levine was somewhat like the type of fellow on this photograph."

Now, how is it that you testified in February that when you were questioned by Mr. Mason that the name Levine rang a bell, and Mr. Mason has said, based on an interview with you, that you could not recognize the name?

A. All I recall telling him is that I could not recognize the name of Sherman.

Q. So you do not feel that it is correct what Mr. Mason has said that he also mentioned to you the name of Samuel or Sam Levine at the same time that he mentioned to you Joseph or Joe Levine, and that you had stated to him that—quote: You could not recognize the name.

A. On the Levine part, I don't recall having told him that.

.

[fol. 75] Q. Now, when Mr. Mason questioned you did he give you any details about Mr. Sherman?

A. No. He did not.

Q. None whatsoever?

A. No. He just told me that there was an immigration case where he was involved and could I help him in his investigation.

Q. Now, I read you from Mr. Mason's statement, where he says: "When furnished additional background data regarding the subject, he (meaning you) again advised that he could not tie it in with the person represented by the photograph." Now, was Mr. Mason not stating the truth when he made this notation in his report?

A. As I said, he told me, "This is a case involving an immigration case," and that's the background he gave me.

Q. Well, would that be identifying data? Would it help you identify Mr.—the respondent here?

Miss Binder: I object to that, Mr. Emanuel.

Special Inquiry Officer: Overruled.

Witness: I don't know what he considers identifying data.

Mr. Gollobin to Witness:

Q. Well, would you consider that by telling you that the subject was involved in a deportation proceeding, that would enable you to identify him better?

Miss Binder: I object to that. The witness has not [fol. 76] identified the respondent according to that report, Mr. Emanuel.

Special Inquiry Officer: Overruled.

Witness: Well, it didn't help me identify him.

Mr. Gollobin to Witness:

Q. Is it your statement then that the only background data you claim that—additional background data you would claim that Mr. Mason furnished you was to tell you that the respondent here was involved in a deportation proceeding?

A. He may have told me other things but I don't recall them now.

Q. But the net effect of whatever he told you was that at that time you could not tie it in—the data, with the person represented by the photograph. Is that correct?

A. I could not identify it as Mr. Sherman— No.

Q. Mr. Morrow, you have had no way to refresh your recollection since that time. Have you?—from records.

A. About . . . No. About what? About this— No.

Q. Whatever you are able to tell has to be purely on the basis of your memory. Is that correct?

A. About my . . .

Q. Your knowledge of the—what you are testifying to with regard to the respondent and yourself.

A. Well, the only thing I've had since then is . . . what I testified to the other day.

Q. My question is: You have not had any other way of refreshing your recollection, and you are depending entirely upon your memory. Is that right?

A. Yes.

[fol. 77] Q. Now, in that statement of Mr. Mason he says that the witness—referring to you—stated he would check his records and notes at home to ascertain if he could come up with a more specific identification of the person he had in mind. Did you do so?

A. As I told you before— Yes. I went up to the attic to look for these things.

Q. And you were not able to give Mr. Mason any further information accordingly. Is that right?

A. That's right.

Q. You are certain of that.

A. Yes. I may have told him I knew Mr. Sherman as being in the Transportation Corps. I don't know whether I mentioned that to him at that time or not. Of course, the only thing I had with him was telephone conversations after that, you know.

Q. Now, with regard to the telephone conversations, what was the—what took place with the first conversation you had with him?

A. I don't recall.

Q. When was this first telephone conversation?

A. I don't know.

Q. How many conversations did you have with him?

A. I think there were two; but I'm not sure.

Q. Well, what took place at the second conversation?

A. He asked me whether I could come down to this building to look at a person and see whether I could identify him.

Q. And what was your answer?

A. I'll try— Yes.

[fol. 78] Q. And when did he ask you to come down?

A. He asked me to come down some morning . . . the morning we had this hearing here.

Q. Well, how long before you came down here—to this hearing here, did he ask you to come down?

A. I don't recall when that was. Maybe a month before—I don't know.

Q. Before you came down and saw the respondent.

A. That's right.

Q. Now, was there anything else asked you?

Miss Binder: May we ask Counsel . . .

Mr. Gollobin: At that time.

Miss Binder: At which time?

Mr. Gollobin to Witness:

Q. The second time you spoke with Mr. Mason.

Special Inquiry Officer: Are you referring to the telephone call, Mr. Gollobin?

Mr. Gollobin: Yes.

Witness: He asked me whether I could come down and see whether I could recognize this person. And would I identify him if I did.

Mr. Gollobin to Witness:

Q. You have already testified to that. I asked you whether there was anything else, Mr. Morrow, or was that the whole conversation?

A. As far as I recall now— Yes.

Q. Were you shown a photograph by Mr. Mason?

A. Yes.

Q. Did you recognize the photograph of the individual by looking at the photograph?

[fol. 79] A. After looking at it for some time, I remarked that there is something familiar about . . . that it looks like a person I know.

Q. Were you able to identify this person?

A. I don't think so.

Q. Do you know whether you were or weren't?

A. I am quite sure I did not identify him.

Q. Now, when did you—when you came here to this building in February, when did you first see this respondent?

A. When he was seated in the big anti-room outside.

Q. And where were you at that time?

A. I was taken inside here and allowed to sit down on the other side of the window here—the partition—and “take your time—can you recognize this man?”—“take your time. Do you recognize this man.”

Q. And you stated then—what?

A. I think I said I can't be sure. I think I had all-told about a half hour or . . . to observe the respondent, and then I said, “Yes. This is Mr. Levine.”

.

Q. Was this person you say was in Spain, was he in your medical unit?

A. He was not.

Q. Was he in your quarters at all where you were trained near Albacete?

A. He was about at times—Yes.

Q. Was he— You are not answering the question. I asked you whether he was in your quarters in Albacete. Where you were living.

A. I would presume—Yes.

[fol. 80] Q. You now remember it . . .

A. No. I do not remember it.

Q. Well, don't presume what you don't remember. We are here under oath, asking you what you remember. Was he one of your medical unit?

A. No.

Q. Was he one of your rifle team?

A. No.

Q. Do you remember the name of anybody else in this transportation unit?

A. There was a Canadian named Dave McKenzie.

Q. How many drivers would you say you ran up again with all these deliveries?

A. ... 60.

Q. Do you remember any others?

A. No.

Q. You say you weren't introduced to Mr. Levine?

A. I don't recall being introduced to him.

Q. Actually, Mr. Morrow, as you can see yourself, you have difficulty remembering things which occurred only last year. Is that correct?

A. True.

Q. And you are here testifying as to things which happened, according to your own testimony, roughly 27 years ago.

A. Yes.

[fol. 81] Q. And you have had no means of refreshing your recollection as to those events.

A. That's true.

Q. And you have no reason to specially remember any particular person's name, such as the respondent, whom you claim you know?

A. That's right.

Q. And you were not in his unit—the unit that you claim he was in. Is that correct?

A. Yes.

Q. Isn't it very well possible, Mr. Morrow, that under these circumstances—the lapse of time and considering also when you spoke to Mr. Mason your difficulty in recalling, and even the length of time that you had to look, by your own testimony, at this man when you were in this building that you possibly could be mistaken?

A. Such a possibility exists.

Miss Binder to Witness:

Q. Mr. Morrow, you have testified here that Mr. Levine is a person whom you saw in Spain. Was that testimony true?

A. Yes.

Q. Now, in answer to Counsel's question just now you said that the possibility exists that you are mistaken. Will you explain that, please.

A. The possibility—such a possibility always exists. There was another person who I have not seen for 25 years who I saw that same day, and after looking at him for 15 minutes, I recognized him—I said Vic Tiship. And he wasn't in my unit either, and, well, I'll be darned, I [fol. 82] had not seen for 25 years, and yet—well, he said he was Vic Tiship.

Q. And you recognized him.

A. Yes.

Q. Do you have any belief that at this time you are mistaken with regard to your identification of Mr. Levine as a person whom you saw in Spain?

A. No.

Q. You are positive you saw this man in Spain?

A. Positive— No. But I feel that I saw this man in Spain.

.

[fol. 83] Q. Now, you have testified here, Mr. Morrow, that your recollection of Mr. Levine in Spain is the fact that he was connected with a transportation unit there. Is that correct?

A. Yes.

Q. And you testified that you recalled seeing him in connection with transportation in Spain on approximately or about 20 occasions. Is that correct?

A. Yes.

Q. And this is to the best of your recollection?

A. Yes. To the best of my recollection.

Q. Can you tell me, you observed this man, you testified here, for approximately a half hour on February 25th

1964—can you tell me what about this man led you to the conclusion that he was the person you had seen in Spain?

A. Certain mannerisms—the way he carries himself, and the way he turned around . . . as the person I knew in Spain—that's all.

[fol. 84]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

GOVERNMENT EXHIBIT 2

U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
150 Tremont Street
Boston 11, Massachusetts

RECORD OF SWORN STATEMENT

In re: JOSEPH SHERMAN

File No. A 2 478 171

PRESENT

JOSEPH SHERMAN	Subject
Attorney Lawrence Shubow	Representative
John W. Kinnevan	Investigator
Martin R. Schofield	Investigator
Ethel Carter	Stenographer

PLACE: 150 Tremont Street,
Boston, Mass.

LANGUAGE: English

DATE: March 30, 1961

INVESTIGATOR KINNEVAN TO SUBJECT:

Q. Mr. Sherman, I am an officer of the United States Immigration and Naturalization Service, and as such am empowered by law to administer oaths and take testimony in connection with the enforcement of the Immigration and

Nationality Laws of the United States. I desire to take a statement from you under oath concerning your right to be and remain in the United States. Do you understand?

A. Yes, sir.

Q. Any statement which you make must be voluntary and of your own free will, and such statement may be used against you by the Government as evidence in any civil or criminal proceedings. Do you understand?

A. Yes, sir.

Q. Are you willing to make such a statement under oath?

A. I don't know what the statements are.

Q. The statements, as I just explained, are concerning your immigration status, whether you have a right to be in this country or not.

A. I came to this country legally in 1920 with my family as a boy of fourteen.

[fol. 85] Q. Are you willing to make the statement?

A. I will give you all the information I can possibly think of.

Q. Do you solemnly swear that all the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. So help me God.

Q. What is your full and correct name?

A. Joseph Sherman.

Q. Have you ever used or been known by any other name?

A. (After consultation with attorney) On the advice of my counsel I think I will decline to answer that.

Q. On what grounds?

A. That they will tend to incriminate me.

Q. Do you have reason to believe that you might incriminate yourself?

A. I am going under advice of my counsel, sir.

Q. Do you mean that you claim the Fifth Amendment?

A. My counsel advised me not to answer that.

Q. Are you willing to tell us what your old country name was?

A. It was translated from Jewish into English. Yossef would be my first name. Sherman would be the family name, only it is pronounced differently.

Q. Did you use that same name in the old country, same spelling?

A. Yes, sir.

Q. Where do you live?

A. I live at 549 Center Street, Newton.

Q. Where were you born?

A. In Poland.

Q. What place?

A. Warsaw.

[fol. 86] Q. And your date of birth?

A. January 1, 1906.

Q. Are you a citizen of Poland?

A. I really don't know.

Q. Have you ever been a citizen of the United States or a citizen of any country other than Poland?

A. No, sir.

Q. How long have you resided in the United States?

A. Since 1920.

Q. What date in 1920, and where did you enter the United States?

A. I believe it was the month of August, in Ellis Island.

Q. Do you recall the day and the name of the vessel?

A. I am not sure, but I believe the day was the 20th and the vessel, the "Imperator" or something like that.

Q. What is your occupation?

A. I am a cab driver.

Q. By whom are you employed?

A. Yellow Cab Corporation in Boston.

Q. Were you registered in 1940, as required of all aliens then living in the United States?

A. Yes, sir.

Q. Do you have any evidence?

A. Yes.

(Presents Form AR-3 issued to Joseph Sherman, 3029 Brighton 4th Street, Brooklyn, New York, bearing number 2 478 171.)

Q. I show you now Alien Registration Form AR-2 bearing number 2 478 171 in the name of Joseph Sherman, executed at Brooklyn, New York, October 11, 1940. Will you look at this and state if it relates to you and if your signature appears on the reverse. In other words, is that the form you filled out when you registered?

A. (After examination) Yes, sir.

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[fol. 87]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

File A—2 478 171—New York, N. Y.

In Deportation Proceedings

IN THE MATTER OF

JOSEPH SHERMAN

also known as:

JOE SHERMAN, CHOIMA SZORMAN, CHAYEM JOSEF SHERMAN,
SAMUAL LEVINE, SAMUEL or SAM LEVINE, Respondent.

Charge: I & N Act—Section 241(a)(2) (8 USC 1251
(a)(2))—entered without inspection.

Application: None.

In Behalf of Respondent: Ira Gollobin, Esq., 1441 Broadway, New York 18, N. Y.

In Behalf of the Service: Clara Binder, Trial Attorney, New York, N. Y.

DECISION OF THE SPECIAL INQUIRY OFFICER—

September 10, 1964

The sole issue is whether respondent is deportable as charged in the order to show cause.

At his initial deportation hearing April 5, 1963, respondent testified he is Joseph Sherman, 57 years of age. At that hearing respondent also testified, as alleged in the [fol. 88] order to show cause, that he is an alien, and had been born in Poland. He asserts, however, that he is not now a citizen of that country, as alleged in the order, but declines to say whether he was last a citizen of Poland. On a claim of privilege under the fifth amendment, respondent refused to testify further regarding the remaining allegations in the order to show cause which assert:

- "3. You last entered the United States at New York, New York, on or about December 20, 1938.
4. You then claimed to be a citizen of the United States.
5. You were not then inspected as an alien by an officer of the United States Immigration and Naturalization Service."

The order to show cause charges that respondent is deportable under Section 241(a)(2) of the Immigration and Nationality Act in that he entered the United States without inspection.

An alien who gains admission to the United States upon a false representation of citizenship thereof is deportable on the ground that he entered without inspection. (*Ex parte Saadi*, 23 F. 2d 334, 336 (S.D. Cal. 1927), *aff'd* 26 F. 2d 458 (9th Cir. 1928), *cert. den.* 278 U.S. 616; *United States ex rel. Volpe v. Smith*, 62 F. 2d 808, 812 (7th Cir. 1933), *aff'd* 289 U.S. 422).

Because respondent refused to acknowledge the correctness of the 3rd, 4th, and 5th allegations in the order to show cause, the burden of establishing deportability by reasonable, substantial and probative evidence is on the Government (Section 242(a)(4) I&N Act).

[fol. 89] The Government subpoenaed and presented Samuel Rubinsky as a witness at respondent's deportation hearing. Mr. Rubinsky testified that upon the request of

respondent, whom he knows as Joe Sherman, he had accompanied respondent to a Government office in June 1937 in order to sign a paper for respondent. The witness stated he did sign the paper and identified his signature on an "Affidavit of Identifying Witness," dated June 8, 1937, on a United States Department of State "Passport Application Form For Native Citizen" filled out and executed the same date in the name of Samuel* Levine, who asserted birth at Brooklyn, New York, October 7, 1909.

Attached to the application form is a photograph which Mr. Rubinsky identified as being that of the respondent, Joe Sherman, as he had appeared in 1937. The description of the applicant set forth in that form: 5', 4", blond hair, blue eyes, a scar on the back of his right hand, was observed by us at the deportation hearing to be applicable to respondent. When questioned March 25, 1959 under court order (Exhibit 8), record of which testimony has been received in these deportation proceedings as Exhibit 9, Mr. Rubinsky acknowledged he had signed the passport application for Joseph Sherman, and that he had never known any Sam Levine. Respondent declined to cross-examine the witness.

Respondent also declined to answer questions regarding the passport application asked him by the Trial Attorney. The application was received in evidence as Exhibit 6, accompanied by certification from the Secretary of State [fol. 90] that the application is the original document from the State Department files upon which passport #439406 was issued June 10, 1937 in the name of Samuel Levine.

Original United States passport with the foregoing name, date of issuance and number, with a description of the bearer and photograph identical with those in Exhibit 6, has been received in evidence as Exhibit 7. The document is attached to Department of State certification that it is

* The given name in these proceedings is variously referred to as Samual, Samuel and Sam. The differentiation is not of importance, and we will not necessarily contradistinguish.

from its files. Respondent likewise has declined to answer questions propounded him by the Trial Attorney concerning the passport.

The passport contains a French visa issued at New York, June 15, 1937, and an endorsement in that language by the Commissariat Special stating: "Seen on Debarking June 22, 1937."

Upon proffer by the Government, the following documentation has also been received in evidence: Exhibit 15, authenticated photostatic copy of page of the passenger manifest of the S.S. Aquitania's arrival at Cherbourg, France, June 22, 1937, listing the name Samuel Levine, 27, a United States citizen; Exhibit 16, reproduction of communication dated October 16, 1937 from the American Vice Consul, Cherbourg, France, to the Secretary of State, Washington, D. C., a "List of American Citizens suspected of having been En Route to Spain as Volunteers for the Loyalist Forces, and who arrived at Cherbourg during the Period January 1, 1937—September 30, 1937," which on page 8 under the June 22, 1937 arrival at Cherbourg of the S.S. Aquitania lists Samuel Levine, age 27, and which is certified by the Archivist of the United States as being from [fol. 91] the General Records of the Department of State; Exhibit 17, document similarly certified which is reproduction of telegram dated December 3, 1938 to the Secretary of State from Barcelona referring to passports which had been endorsed and, on page 2 thereof, referring to Samuel Levine, 439406, June 10, 1937. Page 6 of the passport, Exhibit 7, contains endorsement by the American Consulate General at Barcelona, Spain, December 2, 1938, that it is "valid only for direct return to the United States."

The Government also presented as a witness Edward Morrow, whose name had been changed from Mroczkowski by court order in 1941. The witness, born in the United States in 1915, testified he had left this country in June 1937, and returned here about December 1938, and that during the interval had served with the Loyalist forces in the war in Spain. Mr. Morrow testified that while so

serving he had there met respondent about twenty times, and that respondent was in the Transportation Corps. The witness stated that at that time he knew respondent by the name of Sam or Samuel Levine. Mr. Morrow also testified his return to the United States was aboard the S.S. Ausonia, and that respondent had returned from Spain on that ship with him.

The passport, Exhibit 7, bears on page 4 an endorsement by the Immigration and Naturalization Service, United States Department of Labor, stating: "Arrived Dec 20 1938."

Exhibit 18, copy of another document certified by the Archivist of the United States from the General Records of the Department of State, is a cablegram from the American consul at Le Havre, France, dated December 10, 1938, listing the names of 145 volunteers from Spain who sailed [fol. 92] on the S.S. Ausonia. Page 2 thereof contains both the names of Samuel Levine and Edward Mroczkowski.

Exhibit 10 is Immigration and Naturalization Form I-404 A stating that Samuel Levine, born in Brooklyn, N. Y., October 1, 1909, a citizen of the United States, had entered this country at the port of New York, December 20, 1938, aboard the S.S. Ausonia, listed on manifest #26-30-13482.

We observe that though given opportunity to do so, respondent has not submitted anything contravening the salient evidence against him. We must find that the Government has established with a solidarity far greater than required that respondent is the person who applied for and received the United States passport in evidence as Exhibit 7, and that with that document he had reentered the United States December 20, 1938, claiming to be a citizen of this country named Samuel Levine.

Born abroad and now admittedly an alien, respondent must be found to have been an alien at the time of his entry to the United States December 20, 1938 (*United States ex rel. Meyer v. Day*, 54 F. 2d 336 (2nd Cir. 1931);

see also *United States ex rel. Rongetti v. Neelly*, 207 F. 2d 281 (7th Cir. 1953)).

Though then an alien, respondent was admitted to this country December 20, 1938, upon his claim of citizenship thereof. Because he was not at that time examined as an alien by an officer of the Immigration and Naturalization Service, respondent is now found deportable as charged in the order to show cause.

[fol. 93] In finding that respondent reentered the United States December 20, 1938, we are not unmindful of the collateral discrepancies and contradictions uncovered during the extensive cross-examination of witness Morrow. Those, however, which appear to be but the usual frailties of memory, create an aura of credibility and reliability to the witness' testimony as a whole. Furthermore, the witness, now a reporter for the "New York Times," forthrightly acknowledged there could be a "possibility" he is mistaken in his identification of respondent as having been in Spain. Mr. Morrow, however, testified that despite that possibility, he does not believe he is mistaken in his identification.

In determining that respondent is deportable we have not considered Exhibits 2, 3, or 4, which were received in evidence over respondent's objections. Parenthetically, however, Exhibit 3 is copy of decision October 30, 1961 by the United States Court of Appeals, 1st Circuit in *Sherman v. Hamilton*, 295 F. 2d 516 (cert. den. 369 U.S. 820).

According to respondent (Exhibits 11, 13), he appears to have originally entered the United States in August 1920. Despite his lengthy presence here, he has chosen not to apply for relief from deportation. We must, therefore, order he be deported. Respondent declines to designate the country to which he should be sent. Poland, accordingly, is specified as the country of destination.

The last deportation hearing August 6, 1964 was adjourned to October 5, 1964, with the agreement, however, that if by August 17, 1964, respondent not apply for the benefits of Section 243(h) of the Immigration and Nation-

[fol. 94] ality Act, or if by September 2, 1964 he not submit application for discretionary relief from deportation, proceedings not resume October 5, 1964, and our decision be made on the record through August 6, 1964.

No application under said Section 243(h) has been submitted, and by written communication dated August 25, 1964 (added to the record as Exhibit 19), respondent and his attorney advise that no request is being made for discretionary relief. Accordingly, no hearing was held subsequent to August 6, 1964, and this decision is based on the record existing at the close of that date's hearing.

Order: It Is Ordered that respondent be deported from the United States to Poland on the charge contained in the order to show cause.

Edward P. Emanuel, Special Inquiry Officer.

[fol. 95]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29487

JOSEPH SHERMAN, Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

APPENDIX FOR PETITIONER—filed May 12, 1965

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[fol. 96]

BEFORE THE BOARD OF IMMIGRATION APPEALS

U. S. DEPARTMENT OF JUSTICE

File: A-2478171—New York

In re: JOSEPH SHERMAN aka JOE SHERMAN, CHOIMA SZOR-
MAN; CHAYEM JOSEF SHERMAN, SAMUAL LEVINE,
SAMUEL OR SAM LEVINE.

In Deportation Proceedings

Appeal

Oral Argument: October 26, 1964

On behalf of respondent: Ira Gollobin, Esquire, 1441
Broadway, New York 18, New York.

On behalf of I&N Service: R. A. Vielhaber, Esq.

[File endorsement omitted]

Charges:

Order: Sec. 241(a)(2), I&N Act (8 USC 1251(a)(2))—
Entered without inspection.

Lodged: None.

Application: None.

OPINION—January 7, 1965

Respondent, a 57-year-old married male, a native and last a citizen of Poland, was admitted to the United States for permanent residence in 1920. Briefly, the Service position is that the respondent, using the name Sam Levine, applied for a United States passport, used it to go abroad and to return to the United States; respondent claiming privilege refused to testify on any question relating to a de-[fol. 97] parture from the United States. Counsel contends that although the record may contain evidence that respondent applied for the passport under the name of Sam Levine, there is nothing to show that respondent is the person who received the passport and used it. We believe the Service has borne its burden of establishing that respondent is deportable as charged.

The Service established that respondent, using the name of Samuel (Sam) Levine, executed an application for a United States passport to which was attached his picture and a description which detailed to the point of showing a scar on the back of the right hand, fitted him; the application sworn to June 8, 1937 stated that it was the maker's intent to leave the United States on June 12, 1937. The passport was issued on June 10, 1937.

The passport contained a visa valid for entry to France; the Service established that it had been used to enter France on June 22, 1937 (Ex. 7), that Samuel Levine had been a passenger on a ship which arrived at Cherbourg, France on June 22, 1937 (Ex. 15), that the Samuel Levine who so arrived had been mentioned in a State Department

memorandum dated October 16, 1937 listing the names of Americans suspected of having entered France for the purpose of going to Spain as volunteers for the loyalist forces (Ex. 16, p. 5), that on December 3, 1938, a telegram sent from the American consulate in Barcelona, Spain to the Secretary of State listed the passport as having been endorsed in Barcelona (Ex. 17, p. 2), that the United States passport itself was endorsed at the American consulate general at Barcelona on December 2, 1938 validating it for return to the United States, that the name Samuel Levine appears on a State Department telegram dated at Havre, on December 10, 1938 listing 145 volunteers from Spain who sailed on the SS "Ausonia" for the United States (Government witness Morrow's name (Mroczkowski) is [fol. 98] also included (Ex. 18, p. 2)), that the passport bears a French stamp dated at Le Havre in 1938, that Samuel Levine entered the United States on December 20, 1938 on the SS "Ausonia" being destined to 403 Chester Street, Brooklyn, New York (manifest, Ex. 3, p. 8), that the respondent in about that period had lived on Chester Street (Ex. 2, p. 11), and that in 1943 he had shown that his parents lived at 403 Chester Street (Ex. E).

Government witness Edward Morrow testified that he saw the respondent in Spain between 1937 and 1938. The witness, a citizen of the United States, testified that in April 1963 he had been approached by a Service investigator and asked whether he had been in Spain in 1937 and whether he could identify a person shown in a photo (and its enlargement). The witness stated that there was something familiar about the person but that he could not identify him. To the question whether the person looked like Joe Sherman, the witness replied in the negative; to the question whether the person looked like Sam Levine, he stated that the person shown seemed to carry an association with the name of Levine, but he could not make an identification at the moment. Morrow expressed the belief that a review of letters he had written from Spain might help

refresh his recollection and he stated that he would be willing to make an observation of the respondent. Shortly thereafter, the witness made a rather casual search for his letters but found only a few postcards which did not help him. The investigator called the witness by phone twice in April 1963 and was informed that the search had revealed no additional information. Morrow made a careful search for the letters after February 25, 1964 and learned from his wife that they had been destroyed about three years previously after having been damaged in a flood.

On February 25, 1964 after having secretly observed respondent for about a half an hour, the witness stated the respondent had been in Spain with him, that he him-[fol. 99] self had served with the loyalist forces in Spain from about June 1937 to about December 1938, that respondent had been one of two hundred men who had trained with him, that he associated the respondent with deliveries of supplies made to a military unit to which the witness had been attached, that he had seen the respondent at least 20 times in Spain, that he could not recall having been introduced to him, or having personal contact with him, and that respondent was on the same ship on which he had returned to the United States in December 1938.

Morrow was unable to recall accurately when he had first been approached by the investigator, and he did not show a strong recollection concerning the names and details of events of the period in Spain. On cross-examination Morrow admitted that taking into consideration the lapse of time, the casual nature of the relationship, and the fallibility of his memory, the possibility existed that he was mistaken in his identification; however, with knowledge that the possibility of error existed he stated that it was his belief that he was not mistaken (pp. 99-100).

Counsel contends that Morrow's testimony is lacking in substance or probative value. Counsel stresses the fact that the witness admitted that there was a possibility that he was mistaken in his identification and he contends

that the witness' recollections concerning a superficial association over 27 years ago cannot form the proper foundation for the deportation of the respondent. We find the witness credible and his testimony probative and substantial. The record indicates that the witness is attempting to give best recollection and that he is testifying solely because of his belief that it is his duty as a citizen: no interest or bias is shown. We credit the witness' identification of respondent because the association though not close, was connected with a very important event—an event which [fol. 100] concerned the witness' life and honor. The witness had voluntarily and illegally gone to a foreign country to engage in a war on behalf of an ideal; the respondent had worked with the witness' unit in this war for the achievement of the ideal. Associations connected with this period could well remain despite the passage of years. The witness' ability to recall the substance of the distant period rather than precise details does not detract from his credibility because recall of such a nature is to be expected. The witness, firm in his belief that he made a proper identification, admits that the possibility of error exists; this admission is a mere acknowledgment of the fallibility of human memory; the witness' candor and moderation enhance his credibility.

Counsel is of the belief that Morrow's testimony should be stricken because there was, in his opinion, a willful failure to produce the letters the witness had written to his wife from Spain. The contention must be dismissed. The witness did not recall ever mentioning the respondent in any of the letters; he testified that the letters, damaged in a flood, were destroyed about three years ago. The witness testified without reference to notes. Counsel cites no authority which requires surrender of such letters if they do exist. We believe the record establishes the nonexistence of the letters. If they did exist, counsel had no legal basis for requesting their production (*United States v. Goldman*, 118 F. 2d 310 (2d Cir., 1941) *aff'd* 316 U.S. 129 (1942); *Gold-*

man v. Checker Taxi Company, Inc., 325 F. 2d 853 (7th Cir., 1963).

Counsel attacks Morrow's credibility by attempting to establish a discrepancy in the witness' statements concerning the existence of letters which would serve to refresh his recollection. We find no discrepancy. Morrow testified in June 1964 that the material consisting of letters he had [fol.101] written to his wife had been destroyed about three years previously; counsel believes that the testimony is in conflict with Morrow's statement to the Service investigator that he had notes and his testimony that he had searched for this material in April 1963. A reasonable reading of the testimony reveals that the witness had written letters to his wife during the period respondent was abroad, that the witness believed they were available when he spoke to the Service investigator, that he made a rather casual search for these letters in April 1963, that he was unaware at the time of this search that his wife had destroyed the letters some years previously, and that subsequently conducting a careful search he learned the letters had suffered water damage and had been destroyed.

Counsel does not deny that the Government has established that some person received the passport and used it to reenter the United States after having been abroad; however, he contends there is no proof that the respondent was that person. We believe the record establishes that it was the respondent who used the passport. The use of the name Sam Levine in applying for the passport is not important since it is established beyond any reasonable doubt that the respondent himself applied for the passport giving his true description, attaching his photo to it; and stating that he was going abroad. Under such circumstances, in the absence of evidence to the contrary, proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it. Respondent has produced no evidence to the contrary; there is no contradiction of the Gov-

ernment's case nor is there evidence to establish that the respondent was in the United States during the period in issue.

Counsel admits that under normal circumstances an inference is justified that the person who applied for a document was the one who received and used it, he contends, [fol. 102] however, that under circumstances involving fraudulent procurement of the passport, such an inference is not justified. The contention is dismissed. Respondent resorted to fraud to obtain something he was not entitled to; the facts that he applied, and that he furnished his picture and his description rule out, in the absence of evidence to the contrary, that he was not to be the beneficiary of the fraud. We fail to see why the respondent's fraud in securing his passport under these circumstances should place him in any different position than would be a person who applied for a passport without the use of fraud. We do not find, as counsel does, a balance between the inferences that the respondent did and did not receive the passport, and a balance between the inferences that he did and did not make use of the passport. We believe the record makes it a most unlikely hypothesis that it was one other than the respondent who received and used the passport.

Counsel contends that an adverse inference should be drawn from the unexplained nonproduction of the United States official who endorsed respondent's passport in Barcelona (Ex. 17) and who sent the telegram on December 10, 1938 listing respondent (and Morrow) as returning from Spain and sailing on the SS "Ausonia" and who inspected them on their arrival (Ex. 18). Counsel's contention must be dismissed. We do not believe that an inference unfavorable to the Government should be drawn from the failure to call the officials involved because the officials concerned are not Service employees, and, if available at all, they are as available to the respondent as to the Service, and because the likelihood of the officials recalling that the respondent was the individual they had briefly seen in the

performance of daily routine duties some 27 years ago, is so remote and so unnatural that there is no warrant for [fol. 103] inferring that the testimony of these officials was withheld because it would have been derogatory to the Government. Moreover, even without the evidence contained in the two exhibits, there is evidence that the passport was used abroad.

In connection with the last contention, and in connection with the admission of the other official documents, we would point out that the documentary evidence was admissible without the necessity of presenting the officials concerned with the making or receipt of the documents (28 USC secs. 1732, 1733, 1740, 1741).

Counsel contends that the burden is upon the Government to show that no one else could have used the passport; *Gastelum v. Quinones*, 374 U.S. 469, 479 is cited. The contention is rejected. In *Gastelum*, the Court held that uncontradicted testimony offered by the Service established that Gastelum had joined the Communist Party. The Court held that the Service had failed to present evidence to establish the alien's awareness of the political nature of the Party and could not repair the omission by reliance upon an inference drawn from the alien's silence. Our conclusion that the respondent was outside the United States after his original entry in 1920, is not based upon his silence but upon uncontradicted proof that he was seen abroad, and his action in applying for a document which described him, which was meant to be used by one going abroad, and which was used abroad. We do not see the relevancy of the citation.

We have drawn no inference from the respondent's silence on a claim of privilege; however, we believe that as an alternate ground for sustaining the charge, the corroboration the Service case receives from this silence is available. The drawing of an unfavorable inference is proper because answers concerning the making of an entry [fol. 104] over 25 years ago, cannot on this record which

contains no indication of convictions, indictments, recent questionable activity or associations, even remotely suggest the danger of a criminal prosecution.

Respondent is deportable. He has failed to apply for either of the two reliefs which, as far as this record shows, would permit the creation of a record of lawful entry. The appeal must be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. S. Finucane, Chairman.

[fol. 105]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

Portion of Investigation Report Relating to Edward A. Morrow (5-1-1963) (Exhibit 18B, Pp. 6-7; Item No. 21 in Index to Administrative Record

On April 9, 1963, Edward A. Morrow, a native born United States citizen, was interviewed at 229 West 43rd Street, New York City. He is a reporter for the New York Times. He stated that he was formerly known as Edward Mrowczkowski; that he was one of many college students who had gone to Spain to fight for the Loyalist Forces during the Spanish Civil War, 1937-1938; that he departed from the United States at New York around the middle of June 1937 and believed that the vessel was the SS "Aquitania"; that he became a Sergeant in the 15th Brigade and served with the Mac-Pap Division; that he returned to the United States in Dec. 1938 and believed that the name of the vessel was the SS "Ausonia."

The witness was shown the 1937 passport photograph of the Subject. He stated that the person represented thereon appears vaguely familiar to him and believes he may have been on the "Aquitania" sailing with him in June 1937. However, he could not recall anything specific regarding that person and could not further identify him. When asked if the name Joseph or Joe Sherman or Samuel or Sam

Levine had any significance to him, or if a person bearing such name had been on the SS "Aquitania" trip abroad in June 1937 or on the SS "Ausonia" return voyage in December 1938, with him, he stated that he could not recognize [fol. 106] the name. When furnished additional background data regarding the Subject, he again advised that he could not tie it in with the person represented by the photograph.

The witness stated that he would check his records and notes at home to ascertain if he could come up with a more specific identification of the person he had in mind.

At the time of the interview, Mr. Morrow displayed a willingness to cooperate. He was asked if he would consent to visually inspect the Subject and observe him, to determine if he is the person he had in mind. The witness was agreeable and stated that he would do so and that in the event he determined that it was the same person he would testify to this fact at a hearing.

Morrow was recontacted on April 18 and April 25, 1963. He advised that he could come up with nothing additional after a search was made by him of his notes. He stated however that he now seems to recall that the person he had in mind was a short fellow, about 5' 3" or 5' 3", blond hair, who was in Transportation with the Brigade in Spain during the Civil War. However, he still does not recall that individual by name nor can he positively identify him further. He was still agreeable to physically observe the Subject at our office if requested to do so.

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[fol. 107]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 521—September Term, 1964.

Argued June 9, 1965

Docket No. 29487

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Before: Waterman, Friendly and Smith, Circuit Judges.

By his petition brought pursuant to 8 U. S. C. §1105a(a) to review a final order of deportation issued by the Immigration and Naturalization Service petitioner seeks reversal of that order. Deportation order set aside and case remanded to the Service for its reconsideration in the light of the standard of proof set forth in our opinion.

Ira Gollobin, New York City, for Petitioner.

Francis J. Lyons, Spec. Asst. U. S. Attorney; Robert M. Morgenthau, U. S. Attorney; James G. Greilheimer, Spec. Asst. U. S. Attorney, for Respondent.

[fol. 108] OPINION—September 22, 1965

WATERMAN, Circuit Judge:

This case arises upon a petition to review a final order of deportation by the Immigration and Naturalization Service holding the petitioner deportable under Section 241 (a)(2) of the Immigration and Nationality Act of 1952. 8 U. S. C. §1251(a)(2). We have jurisdiction to review this final order under Section 106(a) of the Act. Immigration

and Nationality Act of 1952, §106(a) as amended, 75 Stat. 651 (1961), 8 U. S. C. §1105a(a). *Foti v. I. N. S.*, 375 U. S. 217 (1963).

The petitioner, an alien, was born in 1906 in Warsaw, Poland. In 1920 he came to the United States and was admitted for permanent residence along with his mother and three sisters. The petitioner contends that the Government has not shown that he has not remained continuously in the United States ever since. The Government, however, seeks to prove that the petitioner traveled to France in June of 1937 using a United States passport issued in the name of Samuel Levine and returned to the United States on or about December 20, 1938 using this same passport, in this manner avoiding the inspection given to all aliens upon arrival in the United States. The Immigration and Nationality Act of 1952 provides that an alien in the United States who entered "without inspection" shall be deported upon the order of the Attorney General. 8 U. S. C. §1251 (a)(2). As there is no time limit on the operation of this section it is possible for the Attorney General to deport aliens who have been residents for a long period but who last entered the country without inspection. For example, this section permitted the Government to proceed against the petitioner in 1963 alleging an entry without inspection [fol. 109] almost twenty-five years earlier.¹ One might wish that the law had taken a different turning, but for better or worse Congress has determined that in order to implement the policy of alien inspection it is necessary to make an alien not properly inspected subject to deportation at any time. Therefore, if the Government's factual contentions are sustained the petitioner can be deported.

¹ Prior to 1952 the Government had only five years after an alleged illegal entry in which to commence proceedings. In the petitioner's case this period expired in 1943. Thus until the 1952 Act, eliminating all statutes of limitation in deportation proceedings, was passed, petitioner could not have been proceeded against. See Gordon & Rosenfield, *Immigration Law and Procedure* §4.6b (1959).

The Government "undertook to show affirmatively" that the petitioner had entered the United States in 1938 without inspection.² Once the Government chose to proceed in this manner, established rules of evidence instruct us that it assumed the burden of persuasion on this issue; that is, the Government assumed the burden of proving the existence of the facts which impose the legal consequences the [fol. 110] Government sought to invoke. See McCormick, *Evidence* §307 (1954). The Government did offer evidence tending to show entry without inspection in 1938, which evidence is precised in the margin.³ The petitioner elected

² The Government might have proceeded on a different theory. The petitioner refused to identify the record of entry of Chomia Szorman on August 8, 1920 as a record of his entry into the United States. As a consequence the time, place and manner of petitioner's entry into the United States were never officially documented. The Board of Immigration Appeals accepted it as proven that petitioner had entered the United States in 1920. Nevertheless, the Government suggests in its brief that since the record of entry of Chomia Szorman was never received in evidence the Government was in a position to take advantage of the presumption contained in §291 of the Act. 8 U. S. C. §1361. Section 291 provides *inter alia* that in any deportation proceeding the burden of proof is on the alien to show the "time, place, and manner of his entry into the United States." If this burden is not sustained, Section 291 goes on to state that the alien shall be presumed to be in the United States "in violation of law." If this presumption obtained in the present case it would be unnecessary for the Government to prove entry without inspection in 1938. But the Government did not proceed in the manner just outlined. No doubt it recognized the petitioner's lawful entry into the United States in 1920 had for all practical purposes been established. See *Sherman v. Hamilton*, 295 F. 2d 516, 518 (1 Cir. 1961).

³ The Government introduced evidence establishing that in June of 1937 petitioner had applied for and received a United States passport under the identity of Samuel Levine. It was also established that someone using the name Samuel Levine traveled to Europe on this passport aboard the SS Aquitania in June of 1937 and that someone using the name Samuel Levine returned to the United States on this passport aboard the SS Ausonia and arrived in this country on or about December 20, 1938. This evidence, of course, did not conclusively establish that Sherman was the individual so using the passport. The only direct evidence tending to

not to introduce any evidence and rested content after cross-examining the Government's chief witness in an attempt to weaken the probative force of his testimony.⁴ At the statutorily required hearing the special inquiry officer found on this evidence that petitioner was deportable for having entered the United States without inspection. Petitioner sought administrative review by the Board of Immigration Appeals of this determination. The Board made its own independent determination of all the disputed factual issues, as is its practice,⁵ and reached a conclusion identical to that reached by the special inquiry [fol. 111] officer. From all that appears in the record neither the special inquiry officer nor the Board paid any heed to the degree of belief that they were required to reach before they could find for the Government, other than to assume tacitly that the Government was simply required to establish the facts on which it relied by a "preponderance of the evidence." It is the petitioner's contention that the Board's decision must be reversed because a higher degree of persuasion is required.

The essence of petitioner's claim is that even though deportation is not a criminal penalty it is a penalty to

prove that petitioner left the United States in 1937 and returned in 1938 is the testimony of Edward Morrow who testified that he recognized petitioner as one of the persons who had served with him in the Spanish Civil War and that he recognized petitioner as one of the passengers on board the SS Ausonia on its return to the United States on December 20, 1938.

⁴ During the extensive cross-examination of Morrow it was stressed that Morrow was testifying to his ability to identify someone he claimed to have met but briefly some twenty-seven years ago; that Morrow admitted to having no "personal contact" in Spain with the individual he claimed was the petitioner; that Morrow when first shown the 1937 passport photograph of "Samuel Levine" did not identify it as the individual he had met in Spain; and that he could not positively identify petitioner as the individual he had met in Spain.

⁵ See Gordon & Rosenfield, *Immigration Law and Procedure* §1.10e (1959).

which serious consequences frequently attach and consequently the requirements of due process in deportation proceedings should be elaborated by analogy to the criminal law rather than to the law of economic regulation. In particular, petitioner contends that in his case the degree of belief which must exist before the Board of Immigration Appeals can conclude that the facts on which deportation depends are true should be defined as it is in criminal cases.⁶ Petitioner does not argue that due process requires the fact finder to have a degree of belief "beyond a reasonable doubt" in all deportation proceedings. He does contend that in such proceedings there is a distinction between the due process due an alien who has resided in this country for a long period of time and that due an alien who only recently came to this country. In the former situation petitioner claims that deportation is tantamount to banishment and that considerations of fairness imbedded [fol. 112] in the concept of due process requires that the Government prove its case beyond a reasonable doubt if it is to succeed.

Even a sympathetic reading of the Government's brief indicates that it largely misunderstands petitioner's argument. The Government invites us to examine the record of the administrative proceedings below and argues that the present deportation order must be sustained as it is based on "reasonable, substantial, and probative evidence." In support of this position the Government draws our attention to Section 242(b)(4), 8 U. S. C. §1252(b)(4), and Section 106(a)(4), as amended, 75 Stat. 651 (1961), 8 U. S. C. §1105a(a)(4), of the Immigration and Nationality Act of 1952. Section 242(b)(4) provides *inter alia* that

⁶ Although the petitioner's brief never says so in so many words, it is clear that in directing our attention to the degree of belief required in criminal cases petitioner refers to the common assertion that in a criminal proceeding the burden is on the prosecution to prove beyond a reasonable doubt all elements of the crime of which the defendant is accused. See 9 Wigmore, *Evidence* §2497 (3d ed. 1940). See generally McBaine, *Burden of Proof: Degree of Belief*, 32 Calif. L. Rev. 242 (1944).

"no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." And Section 106(a)(4) states that a deportation order, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."⁷ Section 106(a)(4) is clearly a general description of the standard of judicial review that governs this and other federal appellate Courts in reviewing final orders of deportation under Section 106(a); that is, the question for the appellate court in reviewing an agency resolution of a disputed factual question is whether there was substantial evidence on the whole record to support the agency's finding. And even though Section 242(b) appears in a section of the Act prescribing agency procedures it is best understood as a restatement of the proper standard of judicial review and a reminder to the Board that final orders of deportation must be based on substantial evidence.⁸ The Government apparently believes that [fol. 113] these sections require a decision in its favor. In our opinion, neither section is relevant to a determination of the issue presently before this court.

The question raised by petitioner's claim concerns the degree of belief that must exist before the Board may conclude that an assertion of fact on which the Government has the burden of proof is true. Such a question is a question of law for a court to decide regardless of how reasonable the Board's resolution of the disputed factual issues in this case may have been. It might be argued, of course, that the Board resolved this question of law against the petitioner and this resolution should not be disturbed by this court on appeal. From the record, however, it is not

⁷ See generally Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record."* 64 Harv. L. Rev. 1233 (1951).

⁸ Gordon & Rosenfield, *Immigration Law and Procedure* §8.12c (1959).

clear that the Board did advert to the problem.⁹ And even if we assume that the Board did rule against the petitioner on this question of law we are not thereby foreclosed from reconsidering the question. There is no indication in the Act that Congress intended the Board to decide what degree of persuasion was appropriate in the case of a long-time resident alien threatened with deportation.¹⁰ Indeed, there is no indication in the Act that Congress adverted in any way to the problem of the degree of persuasion imposed upon the Government in deportation proceedings. The question raised by this petition concerns the degree of persuasion constitutionally required or otherwise appropriate in deportation proceedings involving long-time [fol. 114] resident aliens, and this is a question especially meet for judicial determination.

It is open to us to hold against the petitioner since the Supreme Court has repeatedly stated that deportation proceedings are civil in nature,¹¹ and ordinarily in civil actions the party having the burden of proof need only prove the existence of facts on which he relies by a preponderance of the evidence. 9 Wigmore, *Evidence* §2498 (3d ed. 1940). We do not believe, however, that we are required to conclude the present case in such a syllogistic fashion. As the Court insists that deportation proceed-

⁹ No discussion of this problem, as such, is contained in the Board's opinion. For the most part the Board simply credited the testimony of the government witnesses. It then concluded that this testimony was sufficient to establish the facts on which deportation depends.

¹⁰ If the Act evinced a Congressional desire to leave to the administrative agency the choice between the various degrees of persuasion potentially applicable in deportation proceedings we would be inclined to hold that the question was not meet for judicial determination even though it was a question of law.

¹¹ See, e.g., *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952); *Bilokumsky v. Tod*, 263 U. S. 149 (1923); *Bugajewitz v. Adams*, 228 U. S. 585 (1913); *Fong Yue Ting v. United States*, 149 U. S. 698 (1893).

ings are civil we are precluded from reclassifying them as criminal, and, having thus reversed the major premise, then holding the degree of belief required in such proceedings is that which is required in criminal prosecutions. We are not, however, precluded from considering whether the Government should bear a higher burden of persuasion when it attempts to deport a long-time resident alien regardless of whether the proceeding is civil or criminal in nature. Because the realm of evidence law is one in which courts are especially expert,¹² and because rules regulating the degree of persuasion are traditionally judge-made,¹³ we believe that we may consider whether wisdom and justice require that the Government bear a higher burden of persuasion in the present case.

[fol. 115] It seems clear that due process requires that there be *some* test by which the fact finder can ascertain whether a fact does or does not exist in every legal proceeding.¹⁴ Perhaps due process also requires that in certain criminal proceedings threatening serious penalties the prosecution demonstrate that the facts on which guilt depends are almost certainly true; that is, that the jury must believe beyond a reasonable doubt that these facts exist before it can find for the prosecution. Having come this far it would not be a long step to conclude that this same higher degree of persuasion is constitutionally required in deportation proceedings involving aliens who have resided in the United States for a long period of time because in such a case forc-

¹² See 77 Harv. L. Rev. 556-59 (1964).

¹³ See generally McBaine, *supra* note 6. Professor McBaine assumes throughout his excellent article that the elaboration of rules regulating the degree of belief required in a given proceeding is the province of the judge. Of course, judges will often be constrained by precedent. But we are acquainted with no precedent that bears directly on the issue as we have formulated it on this appeal.

¹⁴ See McBaine, *supra* note 6, at 244.

ble expulsion would be tantamount to banishment—a penalty that surpasses in its enormity many imposed by the criminal law. We have nevertheless concluded that petitioner’s constitutional claim should be rejected. Neither of the cases cited by petitioner convince us that the Court has announced the constitutional rule petitioner urges us to apply in the present case. Petitioner argues that in *Rowoldt v. Perfetto*, 355 U. S. 115 (1957) and *Gastelum-Quinones v. Kennedy*, 374 U. S. 469 (1963) the Court announced that due process requires the administrative agency to believe beyond a reasonable doubt that the facts on which deportation depended are true. Both *Rowoldt* and *Gastelum-Quinones* involved the threatened deportation of individuals alleged to be members of the Communist party within Section 241 (a)(6)(C) of the Act. 8 U. S. C. §1251(a)(6)(C). In both cases the Court reversed, holding the evidence of record did not demonstrate “meaningful” association. Although the issue is not free from doubt, we believe that in these cases the Court held that only individuals who “meaning-[fol. 116] fully” belonged to the Communist party could be deported under Section 241(a)(6)(C) and reversed because no evidence had been introduced establishing meaningful association—an essential element in the Government’s case. The Court did not say in those cases that due process required that the Government prove the facts on which deportation there depended—meaningful membership—beyond a reasonable doubt. Whether due process does so require is still an open question, which we feel we should avoid because we can hold for the petitioner on a nonconstitutional ground.

As we have previously noted, the rules regulating the degree of persuasion in legal proceedings are traditionally judge-made. Thus, as to certain issues, courts have been free to conclude that it is fair and just to require a litigant in a civil action to carry a somewhat heavier burden of per-

suasion than litigants are required to bear as to the issues in most civil actions. 9 Wigmore, *Evidence* §2498 at 329 (3d ed. 1940). In some civil actions courts have even required that one party carry the burden usually borne by the prosecution in criminal proceedings. See, e.g., *Admire v. Admire*, 180 Misc. 68, 42 N. Y. S. 2d 755 (Sup. Ct. 1943) (necessary to prove nonaccess beyond reasonable doubt in overcoming presumption of legitimacy). We have concluded that the present case exemplifies a type of proceeding in which courts should require the Government to carry such a heavy burden. The petitioner entered the United States in 1920. The Government now seeks to deport him alleging that the petitioner left the country in 1937 and reentered without inspection in 1938. If the Government prevails, petitioner will be forcibly expelled from this country and returned to Poland, which is in no meaningful sense his country now. We do not say that the Government should not be able to proceed against petitioner after so long a time. We do hold that the Government is required to establish that it is al-[fol.117] most certainly true that petitioner entered the United States without inspection in 1938; in other words, the Government must prove beyond a reasonable doubt the facts upon which deportation depends.

We wish to stress that we do not hold this higher burden is imposed on the Government in all deportation cases. It is for the Board of Immigration Appeals to decide in the first instance when the rule we announce today relating to proceedings involving long-time resident aliens applies, and we wish to stress that the rule will not expand the scope of judicial review of agency determinations. The purpose of the rule is to impress upon the agency the grave nature of the task it performs. Although repeated attempts to redefine the term "beyond a reasonable doubt" may simply "aid the purposes of the tactician,"¹⁵ we are confident that the imposition of this requirement will have the salutary effect of causing the Board to proceed carefully in extreme

¹⁵ 9 Wigmore, *Evidence* §2497, at 320 (3d ed. 1940).

cases such as the case now before this court. All we can require is that the special inquiry officer and the Board conscientiously ask whether the facts on which the deportation of a long-term resident alien depends are almost certainly true. If these administrators do so proceed the scope of review will remain limited to an inquiry whether the final order of deportation is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

Petitioner contends that we should go on to weigh the evidence against this higher standard and urges that in this light the evidence is insufficient to support a final order of deportation. We cannot agree. The requirement we have announced today is directed at the finder of facts, not the appellate court. Our only course is to dissolve the final [fol. 118] order of deportation and remand for further proceedings not inconsistent with this opinion.

Deportation order set aside and case remanded to Immigration and Naturalization Service.

FRIENDLY, *Circuit Judge* (dissenting):

Appealing as is my brothers' desire to ease the rigors of a statute that permits deportation twenty-five years after the cause,¹ I am unable to find the requisite authority on our part. Moreover, I fear that imposing a special judicially prescribed burden of persuasion on an ill-defined group of cases will introduce confusion and uncertainty into deportation law.

If the slate were clean, I might well agree that the standard of persuasion for deportation should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be "clear, unequivocal, and convincing" and that the Government needs "more than a bare preponderance of the evidence" to prevail. *Schneiderman v. United States*, 320 U. S. 118, 125 (1943); *Chaunt v. United States*, 364 U. S. 350, 353 (1960). But here Con-

¹ It should not be forgotten that Congress has provided a method of relief for such cases, 8 U. S. C. §1254, which petitioner, for reasons best known to himself, has declined to pursue.

gress has spoken, most pertinently in §242(b) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252(b), where it directed the Attorney General to make regulations requiring that

“no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”

[fol. 119] This provision overruled earlier indications that had been taken to recognize a lower quantum of proof as sufficient. See *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106 (1927) (“some evidence” sufficient to sustain deportation order against attack in habeas corpus); Note, *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 698 (1953); Gordon & Rosenfield, *Immigration Law and Procedure* §8.12c (1959). Standing alone, this direction to the Immigration Service to apply a higher standard than had previously been thought permissible might not preclude the courts from insisting on a still higher one in certain types of cases. But Congress made rather plain that, in raising the standard, it did not intend the courts to have liberty to effect further elevations. The House Report on the Immigration and Nationality Act, 2 U. S. Code Cong. & Ad. News (1952) 1653, 1712, stated:

“The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below.”

The intention thus expressed was enacted in 1961, 8 U. S. C. §1105(a)(4):

"Judicial Review of Orders of Deportation and Exclusion.

"[T]he Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

[fol. 120] The standard of "reasonable, substantial, and probative evidence" thus applies in all deportation cases—both to the Service and to the courts.

It is true that the substantial evidence rule itself is "quite malleable and permits wide variances in judicial practice." Gordon & Rosenfield, *supra*, at 857; see also 4 Davis, Administrative Law Treatise §29.02 at 126 (1958), and 1965 pocket part. But cf. *NLRB v. Walton Mfg. Co.*, 369 U. S. 404, 407 (1962). And the Supreme Court has spoken of the "solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years." *Rowoldt v. Perfetto*, 355 U. S. 115, 120 (1957). Granting all this, I perceive no proper basis under the statutory standard for reversing the order here under review; indeed, by remanding the case rather than setting the order aside, my brothers necessarily concede the evidence to have been sufficient even under the reasonable doubt standard they would apply.

If, as has been urged, deportation of a long-time resident should be treated as a penal sanction, my brothers' conclusion might indeed follow on constitutional grounds. But, as they recognize, an inferior court cannot take that step so long as *Bugajewitz v. Adams*, 228 U. S. 585, 591 (1913), *Harisiades v. Shaughnessy*, 342 U. S. 580, 594-95 (1952), *Galvan v. Press*, 347 U. S. 522 (1954), and other Supreme Court decisions remain the law.

I would deny the petition.

• • • • •

[fol. 122]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Robert M. Morgenthau, United States Attorney for the
Southern District of New York, New York, N. Y.

OPINION EN BANC—January 17, 1966

Before Lumbard, Chief Judge, Waterman, Moore,
Friendly, Smith, Kaufman, Hays and Anderson, Circuit
Judges.

Petition to review a final order of deportation. Petition
denied.

The Immigration and Naturalization Service having
moved for rehearing in banc, and a majority of the
judges in regular active service having voted to re-
consider the case in banc and having given the parties
an opportunity to submit further briefs, upon con-
sideration by the court in banc the petition of Joseph
Sherman to review the order of the Service is denied,
for reasons stated in Judge Friendly's dissenting opin-
ion, 350 F 2d at 900. Judges Waterman and Smith dis-
sent and vote to grant the petition and set aside the
deportation order for reasons stated in Judge Water-
man's opinion, 350 F 2d 894.

/s/ Leonard P. Moore, Leonard P. Moore, Acting
Chief Judge.

17 January 1966

[fol. 123] [File endorsement omitted.]

[fol. 124]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Robert P. Anderson, *Circuit Judges.*

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

JUDGMENT—January 18, 1966

A petition for review of an order of the Immigration and Naturalization Service.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said petition be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 125] [File endorsement omitted.]

[fol. 126] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 127]

SUPREME COURT OF THE UNITED STATES

No. 1090, October Term, 1965

JOSEPH SHERMAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE.

ORDER ALLOWING CERTIORARI—April 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Department of Justice
Immigration and Naturalization Service
Washington, D.C.
Form No. 1-100
Rev. 1-1-50

ELIZABETH ROSALIA WOODBY

Passenger

IMMIGRATION & NATURALIZATION SERVICE

Department of Justice

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. _____

ELIZABETH ROSALIA WOODBY,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

ELIZABETH ROSALIA WOODBY prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is set forth in Appendix A, *infra*, being case No. 15637, was decided on September 16, 1965 and is unreported at this time.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 16, 1965.

The jurisdiction of this Court is invoked under 28 USC 1254.

QUESTION PRESENTED

The Petitioner, ELIZABETH ROSALIA WOODBY, was charged with engaging in prostitution after entry into the United States. A hearing was held before a special inquiry officer of the Immigration and Naturalization Service, who found on October 30, 1962 that the Petitioner was subject to deportation and ordered her deported. The Petitioner admitted having engaged in acts of prostitution only for two months, but as a defense stated that she was acting under duress, and therefore should not be subject to deportation. Upon appeal to the Board of Immigration Appeals in a decision dated March 8, 1963, the decision of the special inquiry officer was sustained. A motion to reconsider the decision of the Board of Immigration Appeals was denied in a decision dated May 27, 1963. The decision of the United States Court of Appeals for the Sixth Circuit affirmed the decisions of the special inquiry officer and also of the Board of Immigration Appeals and in a decision dated September 16, 1965 the court found that the previous decisions were supported by "reasonable, substantial and probative evidence on the record considered as a whole."

The questions presented in this case are:

I. Were the decisions of the Board of Immigration Appeals and also of the special inquiry officer supported by "reasonable, substantial and probative evidence on the record considered as a whole"; and

II. Did the United States Court of Appeals for the Sixth Circuit commit error by not returning the case to the Immigration Service to adduce additional evidence as provided in 5 U.S.C. 1037-c.

STATEMENT OF FACTS

The Petitioner is a 30 year old female, who married an American soldier in Germany while he was stationed there. She gave birth to one child in Germany, and remained there for more than a year after her husband returned to the United States. She arrived in the United States in February of 1956, and she, her husband and their daughter lived with her husband's parents in Harlan, Kentucky. A few months later they moved to Dayton, Ohio, where her son was born prematurely on August 13, 1956 (H. R. 25). At that time the Petitioner, her husband and daughter lived at 528 Notre Dame, Dayton, Ohio, and lived at that address for approximately four months after the birth of the child (H. R. 26), this would have been approximately January 1, 1957. At that time the Petitioner's husband virtually forced her to go to Pennsylvania to visit a friend. She returned the next day to find that her husband had taken the children and had moved to Kentucky. She had no funds to follow him and later employed counsel to get the children back (H. R. 27). The Petitioner went to work at McCrory's 5 & 10¢ store, and worked there approximately three months (H. R. 29). This would place the time at approximately April 1, 1957. The Petitioner then went to work at Neil's Restaurant, and at the same time had moved her residence to Summit Court (H. R. 29). The Petitioner received a telephone call from her husband, who was in Kentucky, stating that he needed \$300 at once for an operation for the baby. The baby was supposed to be in the hospital and the husband did not have any insurance or Blue Cross to pay the hospital, and they were not going to perform the operation unless they were paid the \$300 in advance (H. R. 29), and she believed that the child would die if the operation were not performed.

The next day a vacuum cleaner salesman, by the name of Tom Walley, came to the door to sell the Petitioner a vac-

uum cleaner, and she told him the story. He told her that he could help her get the money, since she knew no one else from whom she could borrow the money. He left the apartment and returned with a bottle of whiskey and another man. He took some pictures of her, and it appears that men started coming to the apartment the next day (H. R. 7). These arrangements continued for approximately two months, until the Petitioner had repaid the \$300 which she needed for the operation for her son (H. R. 8). When the Petitioner attempted to cease the arrangement which she had, she was threatened by Walley with being reported to the immigration authorities and the police (H. R. 14 & 15). Even facing these threats of blackmail, the Petitioner terminated this relationship with Mr. Walley, and moved to Knoxville, Tennessee to get away from Walley and remained there until July 4, 1957 (H. R. 34). A Mrs. Jackson, a friend of petitioner, drove to Knoxville, to pick up the Petitioner and brought her back to Dayton, Ohio, where the Petitioner lived with Mrs. Jackson on Rugby Road. They lived there from July 4th, 1957 until some time in September, 1957, when they moved to 1500 W. Riverview, above Neil's Restaurant, where the Petitioner was working (H. R. 40). Mr. Amicon met the Petitioner at Neil's Restaurant in October, 1957 where she was working (H. R. 18). Mr. Amicon was introduced at the restaurant to the Petitioner as an alleged prostitute, but he found that she was not, and that she had ceased all such actions after she had repaid the money which was needed for her son's operation. Amicon testified that he was willing to marry the Petitioner (H. R. 20). Certainly, he would not propose marriage if he did not believe her story. (The Petitioner has been a widow since July 14, 1957, when her husband was killed in an automobile accident.)

The Special Inquiry Officer made a finding of fact which was not supported by the record, in this case. On Page 5 of

his decision, it is stated that Mr. Amicon stated that he met the Petitioner in October of 1957. As a result of this meeting, the Hearing Officer erroneously found that the Petitioner had been practicing prostitution from April 1957 to September, 1957, or for approximately six months. In the record of the proceeding it is stated that the Petitioner went to Knoxville, Tennessee for several months and remained there until July 4, 1957, and that she lived with a Mrs. Jackson, first on Rugby Road and then moved to above Neil's Restaurant in September of 1957. The Petitioner met Mr. Amicon about one month later, as aforesaid. She stated in the record that she ceased practicing prostitution prior to her leaving for Knoxville, Tennessee. The entire time sequence is erroneously stated in the decision.

The decision of the Board of Immigration Appeals again contains partially the same confusion of dates as those contained in the finding of the Special Inquiry Officer. In their finding it was stated that it was not clear from the testimony, whether the Petitioner terminated her acts of prostitution in 1957 or 1958. It is clear, under the facts, that the Petitioner terminated her acts of prostitution in approximately June of 1957 and, therefore, the finding that she committed acts of prostitution after that date is clearly erroneous. The correct time sequence is as follows:

(1) The Petitioner began the practice of prostitution approximately April 1, 1957 and engaged therein for approximately two months (H. R. 8).

(2) The Petitioner traveled to Knoxville and returned therefrom on July 4, 1957 (H. R. 34).

(3) The Petitioner lived with Mrs. Jackson, first on Rugby Road and then at 1500 W. Riverview, above Neil's Restaurant from July 4, 1957, until October of 1957 when she met Mr. Amicon (H. R. 18 & 40).

If the Hearing Officer and the Board of Immigration Appeals had followed this time sequence they would have

found that the Petitioner was acting under duress while she engaged in acts of prostitution. The Petitioner left town on June 1, 1957 to get away from Mr. Walley and returned to Dayton on July 4, 1957 and never engaged in acts of prostitution thereafter.

REASONS FOR GRANTING WRIT

I. WERE THE DECISIONS OF THE BOARD OF IMMIGRATION APPEALS AND ALSO OF THE SPECIAL INQUIRY OFFICER SUPPORTED BY "REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE," WHEN THEY FOUND THAT THE PETITIONER WAS NOT ACTING UNDER DURESS WHEN SHE ENGAGED IN ACTS OF PROSTITUTION, FOR WHICH ACTS SHE WAS FOUND DEPORTABLE.

The Defense in this case is one of duress—if any acts were committed or performed by the Respondent, she did so under duress and is therefore not legally responsible for them under the law.

The Respondent began practicing prostitution in approximately April of 1957, when she was informed by her husband that her son had a head injury, was in the hospital and needed an operation, but that he was not going to have this operation if the sum of \$300.00 was not first paid to the hospital and/or the Doctor. Respondent believed that if the operation were not performed, the child would die. The boy had been a premature baby and had been in the hospital approximately four months after his birth, and this phone call from the Respondent's husband came approximately four months after the child's release from the hospital. The father of the boy had no job, and, of course, was making no effort to procure the money which was needed. The father's character is portrayed quite vividly in the one incident where, after an argument, he placed the Respondent on a bus with \$10.00 to go to Pennsylvania to visit a

friend, and then took the children to his parents' house in Harlan, Kentucky (H. R. 27).

When the Respondent received the phone call concerning the need for her son's operation, she was put in fear for the health and life of her son. She knew that the child would not get the operation if she did not provide the money for it. Not only was her husband not working, but her in-laws had no money either.

The next day a vacuum cleaner salesman came to the door to sell the petitioner a vacuum cleaner and she told him the story. He informed her that he could get her the money and left the apartment and returned with a bottle of whiskey and another man. He induced her to begin practicing prostitution in order to raise the Three Hundred Dollars (\$300.00) she needed for her son's operation. The petitioner ceased all acts of prostitution after she had repaid this sum of money to the lender under threats of blackmail.

The question involved in this case is: "Were these acts of prostitution which were performed by the petitioner performed under duress, or not?" It is our contention that they were performed under duress and are therefore legally excusable. Most cases which involve the excusability of an act because of duress are based upon duress because of fear of injury directly to the moving party. In this case the fear of injury was not to the petitioner herself, but to a third party, to wit: her son. This question is well stated in 40 A.L.R.2d, at Page 917 where it states as follows:

"Although there is only sparse authority on the question whether fear based on threats or injury to others is sufficient to constitute the defense of coercion, it would appear that the determination of such questions depends upon such factors as the relationship between accused and the person threatened or injured, the communication of such threats or injury to accused, etc. The few cases in point

exhibit varying results in view of the individual facts, and circumstances shown.

Thus, where defendant, charged with treason in having aided the Japanese during the war by working for them as a radio script writer and broadcaster, assigned as error the court's refusal to admit additional evidence of duress on others, the state of fear under which the entire broadcasting staff of Radio Tokyo worked and the atrocities committed upon American prisoners of war, it was held in *Iva Ikuko Toguri O'Aquino v. United States* (1951, CA 9th Cal.), 192 F 2d 338, reh den 203 F 2d 390, cert den 343 U.S. 935, reh den 343 U.S. 958, reh den 345 U.S. 931, that no error was committed on rejecting such additional evidence of atrocities and related matters, since it was within the discretion of the trial court in passing upon its admissibility to hold that in order that it be relevant as bearing upon accused's state of mind, and upon the question of her reasonable grounds for apprehension of death or serious bodily injury, that it must have been communicated to her."

The argument in this case is not if the petitioner did or did not act rationally under this set of circumstances, because, what is the rational act of a mother who is in fear that her child might not live if she does not have Three Hundred Dollars (\$300.00) for an operation for her son.

The Federal Courts have in certain cases, involving citizenship and deportation, set forth certain standards and definitions for duress.

In the case of *Insogna v. Dulles*, 116 F. Sup. 473, (1953), the Plaintiff brought an action under the Nationality Act for a declaratory judgment to establish that she was a citizen of the United States and that there had been no expatriation or abandonment of citizenship by her because of the fact that she had accepted governmental employment in Italy. Plaintiff's testimony was that just prior to World War II she had worked as a domestic to support

her Mother and sister; that with the advent of the War, the economy of the small village was so upset that she was unable to find work and that when she sought relief from the Mayor of the village she was told that the village had no money but that she was offered a job working for the government.

The Court stated at Page 475: "There is no legal requirement that this testimony be corroborated by documentary or other proof. *Pandolfo v. Atcheson*, 2 Cir. 1953, 202 F 2nd 38. Thus, in the absence of any showing to the contrary, the Court is of the opinion that the circumstances are such as to justify a finding that the Plaintiff took the job in order to subsist. Self preservation has long been recognized as the first law of nature. In addition, common knowledge of the economic conditions and fears prevailing in a country at war lends credence to the Plaintiff's testimony. The circumstances of the acceptance of employment by Plaintiff justifiably form a basis for the finding of fact, now made by the Court, that same was involuntary and based on duress. "The means of exercising duress is not limited to guns, clubs, or physical threats." *Nakashima v. Atcheson*, DC Cal. 1951, 98 F. Sup. 11; 13. *CF. Mendelsohn v. Dulles*, *supra*; *Ryckman v. Atcheson*, DC Texas 1952, 106 F. Sup. 739, *Schioler v. United States*, DC 111, 1948, 75 F. Sup. 353."

In the case of *Schioler v. United States*, 75 F. Sup. 353, (1948), the Plaintiff brought an action against the United States for declaratory judgment declaring that she was a citizen of the United States and that she never lost her citizenship by reason of she and her husband's petition for Danish citizenship and by reason of her having traveled to the United States on a Danish passport. The Plaintiff, her husband, and their two children, were in Denmark when the Second World War broke out and they were apprehensive for their own safety and that of their children.

They were advised by Danish officials to ask for Danish citizenship because they felt it would be a protection to them and their children.

The Court states at Page 355; "The Court believes that American citizenship is a priceless heritage involving not only privileges but duties and responsibilities, and that among these duties and responsibilities are primarily loyalty and allegiance to the United States. *However, in considering this case, the court also recognized that self preservation is nature's first law and that it is quite natural for mothers and fathers to seek in every way to preserve the lives of their children when their safety is threatened.* (Emphasis added.) When an American citizen finds himself and his family as Paul Schioler did, in the theater of war, their safety threatened, facing the gravest of dangers, even possible death or internment, and in this extremity, on the advice of officials of a foreign state where he happens to be, makes application for foreign citizenship in an effort to preserve the lives and safety of his family, his wife joining in the application, I am of the opinion that under such circumstances the joinder of the wife is not such a voluntary renunciation or abandonment of her nationality as to forfeit her American born citizenship.

I therefore conclude, after a careful consideration of all of the facts in this case, that Petitioner, by joinder in her husband's application did not lose her native born United States citizenship, and that she remains a citizen of the United States and entitled to all the rights and privileges of such United States citizenship and I so hold."

In the case of *Nakashima v. Atcheson*, 98 F. Sup. 11, (1951), the Plaintiff brought an action against the Secretary of State for declaratory judgment declaring her to be a national of the United States. The Plaintiff in the year 1946 voted in a Japanese political election, which was the first in which women were permitted to vote. The occupa-

tion authorities were bringing intense pressure on the Japanese people in an effort to induce them to participate in the democratic process and to exercise their right of suffrage. The testimony of the Plaintiff disclosed that she had the fixed purpose of returning to this country at the first opportunity and was fearful of any interference with her plans and thought that if she did not vote in the election she would displease the occupational authorities and might encounter some difficulty in returning to the United States as a result of not voting.

The Court stated at Page 13: *"The means of exercising duress is not limited to guns, clubs, or physical threats. The fear of loss of access to one's country, like the fear of loss of a loved one, can be more coercive than the fear of physical violence. The Plaintiff's act of voting was not of her own choice, it was impelled by the influence of those who stood in position of authority and was not a voluntary act."* In view of this finding the court held that the Plaintiff did not lose her American citizenship by voting in the election. (Emphasis added.)

In the case of *Mendelsohn v. Dulles*, 207 F 2nd 37, (1953) Plaintiff further brought an action for declaratory judgment to be declared a national of the United States on the ground that he had voluntarily resided in a foreign country for more than five years due to financial inability to buy passage and because of his wife's illness. The Court stated at Page 39: "The Secretary thus presses upon us the adoption of a Spartan standard by which to determine whether the appellant acted voluntarily. He says that Mendelsohn could have embarked for America, turning away from the sick bed and leaving his wife to the care of others while he traveled thousands of miles to retain his nationality. It was indeed physically impossible, and the appellant could have done it if he could have overcome those natural impulses which imperatively require a hus-

band's continued presence with his wife who lies seriously ill. *The Secretary's argument disregards the duress of devotion.* (Emphasis ours.) Mendelsohn acted, it seems to us, under the corrosion of marital affection, which was just as compelling as physical restraint." The case at bar is one of the duress of devotion.

In the case of *Ryckman v. Atcheson*, 106 F. Sup. 739, (1952) the Plaintiff brought an action to obtain a declaratory judgment that she was a national of the United States. The Plaintiff had returned to Canada for periods of time in order that she might take care of her mother who was then 78 years of age and in poor health. The Court stated, when attempting to determine if the Plaintiff's stay in Canada was voluntary or not, at Page 741, quoting the case of *Nakashima v. Atcheson*, 98 F. Sup. 11, (1951) a voluntary act is defined as "an act proceeding from one's own choice or full consent unimpelled by another's influence." *The Court further stated at page 741; that the fear of the loss of a loved one who was not physically able to care for herself and who had no one in the world to care for or stay with her, was in effect duress.* (Emphasis ours.)

In the case of *Rex v. Steane* (1947), K.B. 997 (1947), 1 ALL ENG 813-cca, it was held that the conviction of the Defendant for doing acts likely to assist the enemy and with intent to do so, namely, radio broadcasting in Germany, during the War, could not stand, not only because the criminal intent had not been proved, but also because the trial court in summing up had failed to remind the jury of the various threats made by the Germans that Defendant's wife and children would be put in a concentration camp if he did not obey, and that there were methods of making people do things as well as beatings to which Defendant swore he would have been exposed, since the prisoners defense must be fully put to the jury.

The case at Bar is similar in facts to the case of *Schioler v. United States, supra*, in that case the Court recognized that self preservation is nature's first law and it is quite natural for mothers and fathers to seek in every way to preserve the lives of their children when their safety is threatened. This is what happened in the case at Bar. The Petitioner's every act was performed in order to save what she thought was the life of her child. If there was any fraud perpetrated, it was perpetrated by the Petitioner's husband when he told her about the need for the child's operation. The relationship between husband and wife has always been one of the utmost confidence, and certainly the Petitioner had every right to believe what her husband told her about her child, who was already sick. She felt that the life of her child was so important to her that she was willing to sell herself to save him.

There are many other cases which give the definition of duress, but the only one which used duress as a defense for an order of deportation for the reason that the immigrant had allegedly engaged in prostitution was *In the Matter of M-*, 7 IN 251 (I.D. 804, 1926), where an order of deportation was ordered by special inquiry officer finding that the immigrant had engaged in prostitution in violation of Section 241 (a) (1) of the Act of 1952.

"While working at Magdalena, Sonora, Mexico as a waitress, she was induced by two women to go to Naco, Sonora, Mexico, on the promises that she would be given employment there as a waitress for higher wages than she was then receiving. She had not reached the age of eighteen years, but nevertheless was taken to a house of prostitution and told that she was to work as a prostitute and not as a waitress. She testified that she protested but was told that she owed them one thousand pesos for the expenses in bringing her from Magdalena to Naco, Sonora, Mexico,

and that she would have to repay this money before she could be released. She further testified that she attempted to escape from this house of prostitution on several occasions but was always located and forced to return to a house of prostitution in order to pay the money she owed. She finally met the man who is now her husband and claims that she has never since had illicit relations with any man. Respondent presented several letters attesting to her good moral character and her conduct since she has been married to her present husband. The special inquiry officer stated for the record that he believed that the respondent has testified truthfully and in all sincerity with regard to her experiences as a prostitute.

We have certainly considered all the evidence of record. The respondent has testified that she engaged in the practice of prostitution for a period of less than a year. There is always a showing that the respondent was indebted to the operator of the bawdy house to the extent of one thousand pesos and that she did not earn enough to pay for her meals, much less pay the debt. There was also a showing that at the first opportunity respondent, upon the assurance of security through marriage fled those who had led her astray.

We are of the same opinion as the special inquiry officer that respondent has testified truthfully. *As a matter of law she is not excludable as a prostitute under section 122 (a) (12) of the Immigration and Nationality Act of 1952, because those to whom respondent was indebted reduced her to such a state of mind that she was actually prevented from exercising her free will through the use of wrongful, apprisive threats or unlawful means.* (See *Weisert v. Bramman*, 318 MO 636, 216 SW 2nd 430 (1948); *Walk-A-Show v. Stanton*, 182 MD 405, 35 A 2nd 121 (1943); *Southern Railway Company v. Stewart*, 115 F 2nd 317 (CCA 8, 1940). (Emphasis added.)

We had had occasion in the past to consider facts similar to those presented to the instant case and held that prostitution committed under duress would not support a charge laid under section 241 (a) (1) of the Immigration and Nationality Act. See *Matter of R-H*, A-1050 7646, BIA, December 28th, 1955, unreported. Accordingly we find the charges in the warrant of arrest not sustained. The proceedings will determinate it.

The respondent stated that she had been forced to practice prostitution and that her fall from grace was brought about by fraud, deceit, duress, and coercion practiced upon her and that she was unable to escape from this immoral life."

In the case *Weisert v. Bramman*, 358 MO 636, 216 SW 2nd 430 (1948), duress was alleged by the Plaintiff when she executed a certain agreement with the Defendants. The Court stated "the modern rule of duress as established by the above cases is that 'duress' is to be tested, not by the nature of the threats, but rather by the state of mind induced hereby in the victim"; and that "the ultimate fact in issue is whether the alleged injured party was bereft of the free exercise of his willpower; and of which, the means used to produce such state of mind, the age, sex, capacity, situation, and relation of the parties, are all evidentiary." *Coleman v. Crescent Insulated Wire and Cable Company*, 350 MO 781, 168 SW 2nd, 1060, 1066. However, it is also the general rule that a claim of duress cannot be sustained where there is full knowledge of the facts of the situation and ample time and opportunity for full and free investigation, deliberation and reflection. . . .

In the case of *Walk-A-Show, Inc. v. Stanton*, 182 MD 405, 35 A 2nd 121 (1943), the Court stated when confronted with the statement that a payment had been made to the city of Baltimore under duress, "duress is a condition of mind produced by improper external pressure or

influence that practically destroys the free agency of the party against whom it is brought."

The Court in the *Southern Railway Company v. Stewart*, 115 F 2nd 317 (1940), at Page 321 stated: "There is no legal standard of resistance with which the victim must comply at the peril of being remediless for a wrong done, and no general rule as to the sufficiency of facts to produce duress. The question in each case is whether the person so acted upon, by threats of the person claiming the benefit of the contract, was bereft of the quality of mind essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by the character of the threats, but rather by the effect produced thereby on the mind of the victim. The means used, the age, sex, state of health and mental characteristics of the victim are all evidentiary, but the ultimate fact and issue is whether such person was bereft of the free exercise of his willpower.

The trend of modern authority is to the effect that a contract obtained by so oppressing a person by threats as to deprive him of his free exercise of his will may be voided on the ground of duress. What constitutes duress is a matter of law, whether duress exist in a particular transaction is usually a matter of fact."

The case of *Cooper, et al. v. Cooper*, 69 SO 2nd 881 (1954), was decided by the Supreme Court of Florida where an action was brought by a former wife against her former husband to set aside a certain deed which the wife had allegedly signed under duress. The Court stated at Page 883, while giving the definition of duress, "As was said in the last cited case *duress is a condition of the mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do and act or make a contract not of his own volition.*" (Emphasis added.)

In the case of *Newsom v. Medis*, 205 OKL. 574, 239 P 2nd 784 (1951), the Plaintiff brought an action against the Defendant for actual damages and punitive damages for duress in the signing of a contract. The Court stated at Page 786, "*Duress exists when one, by an unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his free will.*" (Emphasis added.)

"In that case we also said, to deprive one of his will and understanding by reason of threats or other unlawful means, so that a note thus obtained is not his free and voluntary act, constitutes duress."

In the case of *Cappy's Inc. v. Dorgan, et al.*, 313 Mass. 170, 46 NE 2 538, the Court stated at Page 540 when considering whether there was duress or not: "It is settled that a person whose will and judgment are overcome by threats, fear or some other influence, and who is thereby compelled to execute a contract that he would not have made in the free exercise of his will and independent judgment, may avoid the contract on the ground of duress."

Based on the law and the facts in this case, it is clear that the Petitioner was acting under duress at the time she engaged in the acts of prostitution. The decisions of the special inquiry officer and the Board of Immigration Appeals were not therefore supported by reasonable, substantial, and probative evidence on the record considered as a whole, and the Court of Appeals should have found for the Petitioner finding that she was not subject to deportation.

II. DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMIT ERROR BY NOT RETURNING THIS CASE TO THE UNITED STATES DEPARTMENT OF JUSTICE, DIVISION OF IMMIGRATION SERVICE TO ADDUCE ADDITIONAL EVIDENCE AS REQUESTED IN THE PRAYER FOR RELIEF IN THE BRIEF FILED BY

**THE PETITIONER IN THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT
IN THIS CAUSE.**

There were many discrepancies in the times, dates and places in this case which were understandable for the reason that the acts of prostitution took place early in 1957 and yet the hearing before the Special Inquiry Officer was held on March 28, 1962, approximately 5 years later. Because of the time span, much confusion was caused by pinpointing exact times and places and yet this entire case has resolved itself around the exact time that these acts of prostitution took place. The confusion of times and places and the lack of facts is substantiated in the decision of the Court of Appeals when they stated, "Even if it were our function to appraise the harshness of the deportation of this petitioner, we do not have sufficient facts before us upon which to form our own judgment thereon."

Title 5, U.S.C. 1037 (c) *provides that a Court of Appeals may order additional evidence taken in a case such as this, and that a Certified Transcript of such additional evidence and modified or new findings shall be filed with the Court of Appeals. In the case at bar the Court of Appeals did not even act on this request by the Petitioner even though the facts as alleged by the Petitioner did constitute a complete defense to a deportation order. Since the only evidence contained in the record which was used to find the Petitioner deportable, was the testimony of the Petitioner alone, we take the position that it was incumbent upon the Court of Appeals to order additional evidence taken to clear up the discrepancies in times, dates, places and facts as contained in the record in this case.*

There is neither a showing in the record or any other place that the respondent had ever practiced prostitution prior to the 2 month period during which she concedes practicing prostitution, nor, is there any showing that she had

committed any acts of prostitution subsequent to this 2 month period.

CONCLUSION

The Petitioner entered the practice of prostitution for one purpose and for one purpose only, to obtain money so that her child could have an operation which she had been told, by her husband, was necessary, and which she believed was necessary to save the child's life, and when she raised the necessary funds to save the child's life, she quit.

When considering the confidential trust relationship between the Petitioner and her husband, she believed what her husband told her about her son needing an operation to be true.

As a result of this belief that her son needed such an operation, and because she was destitute, she was reduced to such a state of mind and physical condition that it is apparent that she was not acting under a free will in order to choose, as a rational person would, what her acts were, and were going to be, but rather, she was acting under duress. It is clear that these acts which the Petitioner performed were performed as a result of duress, and therefore, under the aforementioned cases, she is not legally and/or morally responsible for her acts.

There is neither a showing in the record, nor in any other place, that the Respondent had ever practiced prostitution, or had committed any immoral acts prior to this two month period, and subsequent to this two month period.

The testimony shows that the Petitioner is highly regarded by the other witnesses at the hearing, and each of them testified that she had not practiced prostitution subsequent to the Spring of 1957. There is nothing in the record which would indicate that the Petitioner's testimony is not completely true.

The relief prayed for in the Court of Appeals was, to reverse the findings of the Board of Immigration Appeals and the finding of the Special Inquiry Officer and terminate the deportation proceedings pending against the Petitioner, or in the alternative to remand the case to the Department of Justice for the taking of further evidence.

The Court of Appeals refused to reverse and in fact sustained the findings of the Board of Immigration Appeals and the finding of the Special Inquiry Officer. *However, it never acted, neither affirmatively nor negatively upon the request that the case be remanded to the Department of Justice for the taking of further evidence as it had the duty to do under Title 5, U.S.C. 1037 (C).*

We respectfully submit therefore that the Petition for Writ of Certiorari be granted in this case.

SIDNEY G. KUSWORM, SR.,
JACOB A. MYERS,
Attorneys for Petitioner.

Decision of the U. S. Court of Appeals

DECISION OF THE U. S. COURT OF APPEALS

(Filed September 16, 1965)

No. 15637

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ELIZABETH ROSALIA WOODBY,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

On Petition for Review of Denial of Motion to Reconsider

Decided September 16, 1965.

Before MILLER, O'SULLIVAN, and PHILLIPS, Circuit
Judges.

O'SULLIVAN, Circuit Judge. This case is before us upon the petition of Elizabeth Rosalia Woodby to review and vacate an order of the Board of Immigration Appeals entered on May 27, 1963, denying her Motion to Reconsider its earlier order of March 8, 1963. The March order dismissed her appeal from an order of a Special Inquiry Officer directing that she be deported to Germany. The deportation proceedings were had under 8 U.S.C.A. § 1251 (a) (12), which provides that,

"(a) Any alien in the United States . . . shall . . . be deported who—

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(12) by reason of any conduct, behavior or activity at any time after entry became a member of the classes specified in paragraph (12) of section of 1182(a) of this title;”

Section 1182(a) (12) defines as a class subject to exclusion,

“(12) aliens who are prostitutes or who have engaged in prostitution. . . .”

The special inquiry officer conducted a hearing pursuant to 8 U.S.C.A. § 1252, at which testimony was taken and petitioner was represented by counsel. Petitioner and three other witnesses testified at such hearing and affidavits of petitioner and another obtained upon prehearing investigation were received in evidence. The inquiry officer found that petitioner had engaged in prostitution as charged and ordered that she be deported. Petitioner concedes that she did engage in prostitution, but claims that she did so while acting under duress which arose from the circumstances hereinafter set forth.

On January 8, 1955, petitioner Woodby, a native of Hungary and a citizen of Germany, married an American soldier then in service in Germany. Two children were born of the marriage. The first, a girl, was born in Germany and the second, a boy, was born prematurely in the United States on August 13, 1956. Petitioner was admitted to the United States on February 7, 1956, and went to live with her husband and daughter at the home of her husband's parents in Harlan, Kentucky. A few months later petitioner and her husband moved to Dayton, Ohio, where the second child was born. Petitioner's infant daughter was then living with her paternal grandparents in Kentucky. It is clear from the evidence that petitioner's husband gave little attention to the support and care of his wife and children.

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Petitioner and her husband and the new born son lived for a time in Dayton until, as claimed by petitioner, the husband left her in early 1957, taking the son with him, and presumably took up residence in Harlan, Kentucky, with his parents and children. The husband was killed in an automobile accident about July 14, 1957.

It was after her husband left her that petitioner entered into the practice of prostitution. Her account of the facts which she claims made such conduct the product of duress is as follows:

While working to support herself, and about April 1, 1957, (later changed to February 7, 1957), she got a telephone call from her husband, who told her that their infant son was seriously ill and needed an operation that would cost \$300.00. He stated that he had no money or Blue Cross insurance and requested her to provide the needed cash. The next day while petitioner was alone in her apartment contemplating her plight and crying, fearful that her son would die unless she could get the money for his operation, a vacuum cleaner salesman came to her apartment. Observing petitioner's apparent state of anxiety, this man asked the cause and told her he could help her get the money. He left momentarily and shortly returned with another man and a bottle of whiskey. After petitioner had consumed some whiskey, this vacuum cleaner salesman and part-time panderer proposed that he would lend petitioner the needed money to be repaid with her earnings as a prostitute from customers he would procure. She was importuned to disrobe and have some pictures taken in the nude, presumably to aid the procurer to attract business to her. Petitioner thereupon began the regular practice of prostitution, carrying it on in addition to her employment as a waitress. She continued in this enterprise until she had earned enough to and did repay the loan.

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She testified that she ceased her life as a prostitute about July 1, 1957, (later changed to early April, 1957), and went to Tennessee, later to return to Dayton with a woman friend. She stated that she did not thereafter engage in prostitution, although she admitted to continuing sexual relations with a man whose first meeting with her was to keep a prostitution engagement.

A very confused record ends its identification of petitioner's activities with the latter part of the year 1958. What occurred between then and the immigration authorities' investigation of her in about the middle of 1961 is not revealed. The record suggests some effort on petitioner's part to regain custody of her children from her husband's parents, but the record is silent as to the outcome. The record is likewise silent as to how and why the immigration authorities became interested in petitioner at least three years after, as far as the record before us discloses, she discontinued activities as a prostitute. We have been told nothing as to the legal custody of petitioner's children, except for the observation in the decision of the Special Inquiry Officer that "since her citizen children are now in the legal custody of respondent (*sic*) father- and mother-in-law, there is no basis for considering that her deportation would result in extreme hardship to her children." The appendices before us give no advice as to the basis for such observation nor whether the grandparents in any way excited the government's interest in deporting petitioner. The Special Inquiry Officer further said that while at the time of the hearing in 1962 petitioner's children had been with the grandparents for two years, "there is no indication that respondent has the received custody of the children, although at the hearing she testified she had engaged a lawyer for proceedings to regain their custody."

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The order of deportation provides that petitioner, the mother of these infant American citizens, "be deported . . . to Germany" and that if Germany will not accept her, "the respondent shall be deported to Hungary."

The evidence which has brought about her deportation was principally supplied by information disclosed to the authorities by petitioner herself, together with that of three obviously friendly witnesses called at the hearing before the Special Inquiry Officer. This officer's conclusions were based on this testimony and sworn statements earlier taken from petitioner and a gentleman friend of hers. This man testified that while his first meeting with petitioner in October, 1957, was to enjoy her availability as a prostitute, he fell in love with her and would like to marry her if he could obtain a divorce from his wife. We assume that, for whatever reason, this marriage has not yet taken place, although petitioner admits having sexual relations with this man after she had discontinued her prostitution until a time shortly before the hearing.

The decision of the Special Inquiry Officer and the affirmance of that decision by the Board of Immigration Appeals were not based upon a conclusion that petitioner's story of entering prostitution under the duress of having to raise \$300.00 to save the life of her son was false. They referred to it as a "bizarre story" and "a hard story to believe." But they concluded that whatever the circumstances that prompted its beginning, she continued to carry on the business of prostitution after the original compulsions had ceased to operate. The Board of Immigration Appeals stated,

"Even if the respondent's story is to be believed, and even if it be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress, nevertheless the con-

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tinuance of the practice of prostitution until at least late 1957 is not explained and cannot be defended on the ground of duress."

It is quite apparent that the Board and the Special Inquiry Officer arrived at their factual conclusion from the many discrepancies in petitioner's testimony and its contradiction by statements made by her in her prehearing sworn statement. There was much confusion as to the places at which and the times during which she carried on as a prostitute. Such confusion would permit a finding that her activity in this regard extended into late 1957 and possibly late 1958, and that she was freed of the claimed duress in early 1957. There is no evidence of prostitution by her after 1958 and in her address to this court she implied that she has been leading an exemplary life since the latest date that the proofs established prostitution. She testified at the hearing that she has not returned to prostitution, and the three other witnesses testified to her good character and reputation. We are not informed as to the custodial status of her children from and after the proven period of her prostitution. Her hearing was held March 28, 1962, the Special Inquiry Officer's decision was rendered October 30, 1962, her appeal to the Board of Immigration Appeals was dismissed March 8, 1963, and her Motion to Reconsider was denied on May 27, 1963. The Motion to Reconsider, verified by her oath, did not rely upon a claim of her children's need for her. Further evidence of her continued good behavior or her children's need for her might move the immigration authorities to withhold the seeming cruelty of tearing a young mother from her children and sending her from the country of which they are citizens. Even if it were our function to appraise the harshness of the deportation of this petitioner, we do not

Decision of the U. S. Court of Appeals

have sufficient facts before us upon which to form our own judgment thereon. We believe that our function ends when we find, as we do, that the Board's underlying order is "supported by reasonable, substantial, and probative evidence on the record considered as a whole . . ." 8 U.S.C.A. § 1105(a)(4), and that denial of petitioner's Motion to Reconsider was not an abuse of discretion. The Board made out its case and it is not for us to say that petitioner's post-prostitution good conduct, if such had been proved, required forgiveness and the withholding of deportation. We are not at liberty here to proceed on the basis of what we might have done had we been in the position of the immigration authorities.

Giova v. Rosenberg, . . . U.S. . . . (1964) held that denial of a Motion to Reopen is a final order, reviewable by this Court even though such review is sought more than six months from the order of deportation, but within six months of denial of a motion to reopen. The respondent Immigration and Naturalization Service contends that inasmuch as the petition for review here was filed more than six months from the date of the order of March 8, 1963, affirming the order of deportation, we are limited to reviewing the discretionary denial of the Motion to Reconsider. See 8 U.S.C.A. § 1105a(a)(1).

Petitioner contends that her Petition for Review requires that we test the Board's action under 8 U.S.C.A. § 1105a(a)(4) which seemingly permits us to consider whether the underlying order was supported by "reasonable, substantial, and probative evidence on the record considered as a whole." We need not decide this suggested limitation upon our review powers because, as stated above, we are persuaded that the Board orders must be affirmed on either ground.

It is so ordered.

*Appendix***APPENDIX****UNITED STATES DEPARTMENT OF JUSTICE****Immigration and Naturalization Service****Oct. 30, 1962****File: A10 331 472—Cleveland, Ohio**

In The Matter Of
**ELIZABETH ROSALIA
 WOODY**

Respondent

**IN DEPORTATION
 PROCEEDINGS**

CHARGE:

**I & N Act—Section 241(a) (12), prostitution after
 entry [8 U.S.C. 1251(a) (12)]**

APPLICATION: Termination of proceedings

**In Behalf of
 Respondent:**

**Sidney G. Kusworm, Sr.,
 Esquire**

**Jacob A. Myers, Esquire
 403 Keith Building
 Dayton, Ohio**

**In Behalf of
 Service:**

**W. Nelson Brown
 Examining Officer
 Cincinnati, Ohio**

DECISION OF THE SPECIAL INQUIRY OFFICER

**Respondent is a female, 30 years old, a widow and the
 mother of two United States citizen children who at the
 time of the hearing were in the legal custody of her father-**

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and mother-in-law. She is an alien, a native of Hungary and a citizen of Germany, whose only entry into the United States was on or about February 7, 1956, at New York, New York.

The order to show cause contains the allegation, "You have engaged in prostitution after entry," and charges her with deportability pursuant to section 241(a)(12) of the Immigration and Nationality Act [8 U.S.C. 1251(a)(12)], in that by reason of conduct, behavior or activity at any time after entry she became a member of any of the classes specified in section 212(a)(12), to wit, aliens who have engaged in prostitution.

Respondent admits she engaged in prostitution after entry, but claims it was in circumstances of economic and emotional duress occasioned by news that her infant son needed hospitalization which would cost \$300, a sum which a procurer, a stranger to her, agreed to advance to her to be repaid from money she would receive from men he would send to her.

The respondent came to Germany from Hungary in 1945 as a displaced person. On January 8, 1955, she married a United States citizen serving in the United States armed forces in Germany. Their first child, a girl, was born in Germany. After respondent's arrival in the United States in February in 1956 she and her husband and daughter lived with her husband's parents in Harlan, Kentucky, for a few months, then came to Dayton, Ohio, where her son was born on August 13, 1956. As prematurely born, the infant remained in the hospital for three or four months. Respondent testifies that when the baby was released from the hospital, she and her husband quarreled and her husband virtually forced her to visit a friend in Pennsylvania. She returned after one day to find that her husband had

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taken the baby and left for Harlan, where her daughter already was. This would have been in late 1956.

About four months later, according to respondent, she had a telephone call from her husband telling her that the baby had to be hospitalized and that \$300 was needed at once and that she was the only one in the family who could raise that sum. The next evening, so her story goes, she was alone in her apartment, crying, when a vacuum cleaner salesman called. She told him of her troubles and that since she had just taken a job as a waitress she knew no one from whom she could borrow the money. The salesman said he might be able to help her. He left the apartment and soon returned with a bottle of whiskey and another man. After a few drinks around the salesman offered to advance the money, to be repaid, as aforesaid, from what she received from men he would send to her. As a waitress she was free afternoons to accept dates. Respondent agreeing, the salesman and the man with him then took some photographs of respondent in the nude, she had the \$300 the next day and received her first customers. Respondent testifies she continued receiving men in prostitution for about eight weeks until she was able to repay the salesman. She then wanted to quit but the salesman threatened to report her to the police or the immigration authorities, and she did continue for another two weeks after these threats, and then she met Mr. Amicon and quit prostitution (H. R. 13, Ex. 2, p. 16).

The only precedent decision of the Board of Immigration Appeals involving prostitution committed under duress is *Matter of M—*, 7 I. & N. Dec. 251 (1956). The alien there was a girl of 17, an orphan, whom two women transported from one Mexican city to another on promises of employment as a waitress at higher wages. Instead she was forced

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into a house of prostitution and told that she would have to remain until her transportation costs of a thousand pesos were repaid. On several occasions she attempted unsuccessfully to escape. The Board stated as follows: "As a matter of law she is not excludable as a prostitute under section 212 (a) (12) of the Immigration and Nationality Act of 1952, because those to whom respondent was indebted reduced her to such a state of mind that she was actually prevented from exercising her free will through the use of wrongful, oppressive threats or unlawful means [footnote omitted]."

No threats or unlawful means accompanied the salesman's proposition to Mrs. Woodby. If her story is believed, anxiety for her child made the proposition acceptable and she voluntarily accepted it, though in less pressing circumstances she would have rejected it. If it is argued that the salesman used liquor to influence respondent's initial decision, there was opportunity the following day to repent and reject the proposal.

If as a matter of law the story she tells should make the defense of duress available, a careful study of the record discredits that story. The chronology of events is decisive. The first clear date is August 13, 1956, when her son was born. About four months later the son was released from the hospital and her husband left her, taking the infant with him. This would have been about December, 1956. The son's later need for hospitalization came when he was six to eight months old, and when respondent was living in Summit Court, Dayton (Ex. 2, p. 10). At the latest, this would have been April, 1957, when respondent admittedly began practicing prostitution. The date is further fixed by respondent's testimony that after her husband left her she found a job at McCrory's, which she held for three

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months before commencing at Neil's Restaurant. It was shortly after she started work at Neil's that she received the telephone call about her son (H. R. 29).

As before indicated, it was when she met Mr. Amicon that she quit postitition. At the hearing, Mr. Amicon testified he met respondent around October, 1957 (H. R. 18). If Mr. Amicon correctly fixed the month and year, respondent had by then been prostituting since April, or about six months, rather than the approximate two months she admits to in which she raised the \$300 to repay the vacuum cleaner salesman. From the record, however, it appears that the year in which she met Amicon was 1958 rather than 1957. Amicon testified that when he first met respondent she was living at 1500 Riverview in an apartment above Neil's (Ex. 3, p. 3). From respondent's testimony and that of her witness, Mrs. Jackson, it develops that respondent did not move to the apartment at 1500 Riverview above Neil's until late 1958. When respondent left Summit Court she went to Knoxville, Tennessee, where she stayed three months (H. R. 33, 34). She had moved to Summit Court about two months after her husband left her, or about February of 1957 and resided there about a year or longer, or until February, 1958, or later (Ex. 2, pp. 3, 4). She left Summit Court when its management learned, according to respondent, that one of the vacuum cleaner salesman's girls, who was sharing respondent's residence there, was practicing prostitution, and told her to leave (Ex. 2, p. 21). Respondent returned from Knoxville on July 4, 1958, when her friend Mrs. Jackson came from Dayton to get her. She then shared an apartment on Rugby Road until September, 1958, when they moved to 1500 West Riverview, the apartment over Neil's Restaurant (H. R. 40). This was the apartment to which she took Mr. Amicon when she was introduced to him as a prostitute.

Appendix

Respondent and Mrs. Jackson lived together until about February, 1961, or a period of about two and a half years, according to the testimony of respondent's witness, Mrs. Jackson (H. R. 40). These dates, supplied variously by respondent, Mrs. Jackson and Mr. Amicon and mutually corroborated in one detail or another, demonstrate that respondent commenced practicing prostitution about February of 1957, whatever the reason or provocation may have been, and continued until late 1958, long after she had repaid the salesman's loan, if her story about the loan be believed. Parenthetically, it is a hard story to believe.

I find the fourth allegation of the order to show cause sustained by the respondent's testimony, that of her witness Mrs. Jackson, and that of the man who testified that he hoped to marry her. There are other indications in the record that respondent may have been engaged in prostitution before the time she admits she did and after the time she claims to have stopped. They are corroborative, but need not be detailed.

The respondent, through counsel, has made application only for termination of proceedings. On the record of this proceeding and the charged ground of deportation, the only eligibility for relief from deportation would be an application for adjustment of status under section 245 of the Act [8 U.S.C. 1255] and waiver of inadmissibility under section 212(g) [8 U.S.C. 1182(g)]. Since her citizen children are now in the legal custody of respondent father-and mother-in-law, there is no basis for considering that her deportation would result in extreme hardship to her children. The custody of the grandparents was at the time of hearing of two years' duration. At the present writing there is no indication that respondent has received the custody of the children, although at the hearing she had engaged a lawyer for proceedings to regain their custody.

Appendix

Respondent has designated Germany as the country of her deportation. Should Germany not accept her, the special inquiry officer specifies Hungary as the country of deportation, that being the country of her birth.

ORDER: IT IS ORDERED that the respondent be deported from the United States to Germany on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforementioned country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to Hungary.

/s/ RICHARD P. LOTT
RICHARD P. LOTT
Special Inquiry Officer

Appeal

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

(Filed March 8, 1963)

File: A-10331472-Cleveland

In re: ELIZABETH ROSALIA WOODBY

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: January 21, 1963

On behalf of respondent: SIDNEY G. KUSWORM, ESQ.
403 Keith Building
Dayton 2, Ohio
(Did not appear submitted
case on brief)

On behalf of I&N Service: Irving A. Appleman, Esq.

CHARGES:

Order: Sec. 241(a)(12), I&N Act (8 USC 1251 (a)
(12))—Prostitution after entry

Lodged: None

APPLICATION: Termination of proceedings

The case comes forward on appeal from the order of the special inquiry officer dated October 30, 1962, finding the respondent deportable on the charge stated above and directing her deportation to Germany or, in the alternative, to Hungary.

The respondent is a native of Hungary, a citizen of Germany, 30 years old, female, whose last and only entry into the United States occurred on or about February 7, 1956, at the port of New York. She had married a United States citizen serving in the United States Armed Forces in Germany on January 8, 1955, and a daughter was born to

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them in Germany. The respondent and her daughter lived with her husband's parents in Harlan, Kentucky, for a few months and then came to Dayton, Ohio, where a son was born on August 13, 1956. This was a premature birth and, as a consequence thereof, the baby remained in the hospital for several months. The respondent testified that when the baby was released from the hospital she and her husband quarreled and her husband virtually forced her to visit a friend in Pennsylvania; that she returned after one day to find that her husband had taken the baby and left for Harlan where her daughter already was. This would have been about December 1956.

When the son was about six to eight months old, the respondent testified she received a phone call from her husband telling her that the baby son required hospitalization and that \$300 was needed at once. The next evening she was alone in her apartment, crying, when a vacuum cleaner salesman called, to whom she told her troubles. After a few drinks the salesman offered to advance her the money to be repaid from what she received from men he would send to her. Compelled by circumstances, the respondent agreed; a man with the salesman took some photographs of her in the nude. She received the \$300 which she sent to her husband and continued the practice of prostitution for about eight weeks from April 1st 1957 until she was able to repay the salesman. She then wanted to quit but the salesman threatened to report her to the police or immigration authorities and she continued for another two weeks but when she met a Mr. Amicon she quit prostitution.

In her statement dated November 20, 1961 (Ex. 2) the respondent at first testified that she engaged in illicit sex acts but maintained that she only received gifts for such occasional acts, that she did not solicit men in such acts and that she had sexual relations with only three men since

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her marriage. She further testified that about six or eight months after her son was born her husband asked her for money to pay for the son's hospitalization and that she borrowed \$300 from a vacuum cleaner salesman named Tom Wally but that she received only \$40 or \$50 from illicit sexual relations. She stated that her employer took the \$300 out of her pay. After being admonished to tell the truth, she then stated that Mr. Wally, who had called on her to demonstrate a vacuum cleaner, and to whom she told the story of needing \$300, agreed to give her \$300 if she would practice prostitution and that she agreed although she did not realize it was prostitution and that men paid her \$5 or \$10; that after she had the \$300 she sent it to her husband and as far as she knows the boy had the operation and is all right. In her statement she testified that she indulged in this practice for about two months, the first time in Summit Court and that she received two men a day for three or four days a week and that all these acts occurred at the Summit Street address.

According to the respondent's story she practiced prostitution from about April to June 1957. Mr. Amicon, in his statement of November 15, 1961 (Ex. 3) stated that he first visited the respondent for the purpose of sexual intercourse about the first of December 1957 when the respondent was living at 1500 West Riverview, that he could not go through with it but left her the money anyway. He stated he then went back with his wife for Christmas and resumed a sexual relationship with the respondent about February 1958 but he did not pay for it and that sex turned into love. This witness admitted making a statement to the police acknowledging that he had paid the respondent for prostitution but he said he did so to prevent the officers from taking the respondent's child to a children's home. Mr. Amicon stated that he did not know of any other persons

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with whom she engaged in acts of prostitution and did not know that she was a prostitute other than those times when he paid her for such acts (Ex. 3, p. 7). He also confirmed respondent's story to the extent that she had told him that her little boy needed an operation in the amount of \$300 and that a vacuum cleaner salesman, to whom she had told her troubles, arranged for her to practice prostitution to raise the money.

Mr. Amicon appeared as a witness at the hearing and testified that he met the respondent about October 1957, and that he was told by a friend that she practiced prostitution, that he visited her for that purpose but did not have sexual relations at that time although he left her \$10. The witness corrected his statement of November 15, 1961, to the effect that he did not pay the respondent for acts of prostitution.

The respondent stated that she resided at Summit Court, Dayton, Ohio, about two months after her husband left her in December 1956, or that February 1957, and resided there about a year and a half (Ex. 2, pp. 3-4). She testified that she stayed at Knoxville, Tennessee, for three months and returned on July 4, 1957, or 1958 when Mrs. Jackson picked her up. (Tr. pp. 34-35); that she lived with Mrs. Jackson for two weeks on Rugby and then they moved to an apartment at 1500 Riverview above Neil's where she was working. She further testified that she lived with Mrs. Jackson about a year.

Mrs. Arlene Jackson appeared as a witness for the respondent and testified that the respondent called her from Knoxville, Tennessee, to pick her up and that she returned to 1936 Rugby Road, Dayton, Ohio, on July 4th; that they moved in September to 1500 West Riverview above Neil's where they lived until between Christmas and New Year's, 1958. She stated that the respondent lived with her until about February 1961, a total period of two and a half years.

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It is noted that the respondent had first denied the practice of prostitution, stating that she engaged in illicit intercourse for gifts only three months; and then later changed her story to the effect that she engaged in prostitution as a result of an urgent request from her husband, from whom she was separated, for \$300 to pay for hospitalization for their son; that she entered into prostitution as a result of an arrangement with a vacuum cleaner salesman and that she practiced prostitution from April 1957 for eight to ten weeks or until June or July 1957. A witness, Mr. Amicon, has testified variously that he met the respondent in October or December 1957 at 1500 West Riverview above Neil's when he was referred to her as a practicing prostitute. A witness for the respondent, Mrs. Jackson, has testified that the respondent moved with her to 1500 West Riverview above Neil's in September 1957 and remained there until 1958. They continued living there until Christmas or New Year's of 1958. The testimony of these witnesses makes it apparent that the respondent was engaged in the practice of prostitution until about October or December 1957 and not, as she claimed, until June or July 1957.

Even if respondent's bizarre story that she engaged in prostitution to raise \$300 for her son's operation is accepted, it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958, long after she had repaid the loan from the vacuum cleaner salesman. While it is not clear from the testimony whether it was 1957 or 1958, taking the evidence most favorable to the respondent it was at least late 1957. Even if the respondent's story is to be believed, and even if it be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress, nevertheless the continuance of the practice of prostitution until at least

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late 1957 is not explained and cannot be defended on the ground of duress. Upon a full consideration of all the evidence of record, it is concluded that the evidence establishes deportability on the charge contained in the Order to Show Cause. The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

/s/ THOS. G. FINNSANE
Chairman

Motion

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

(Filed May 27, 1963)

File: A-10331472-Cleveland

IN DEPORTATION PROCEEDINGS

MOTION

On Behalf of Respondent: SIDNEY G. KUSWORM, Esquire
Kusworm and Kusworm
403 Keith Building
Dayton 2, Ohio

CHARGES:

Order: Sec. 241(a)(12), I&N Act (8 USC 1251 (a)
12))—Prostitution after entry

Lodged: None

APPLICATION: Motion to reconsider

Respondent, whose deportation is set for May 28, 1963, moves for reconsideration of the Board's order of March 8, 1963 requiring her deportation upon the ground stated above; oral argument is requested. The request for oral argument and the motion will be denied.

Respondent, a 30-year-old female, a native of Hungary and citizen of Germany, was admitted to the United States on February 7, 1956. She was charged with having practiced prostitution after entry. The deportation proceedings reveal that respondent admitted having practiced prostitution but stated that it was under the duress of raising money to pay for an operation. The special inquiry officer and the Board found that assuming duress had been present

Motion

at all, respondent had nevertheless continued to engage in prostitution after the duress had been removed.

The motion gives no reason for the reconsideration but has attached to it an affidavit from the respondent and one from Anthony Amicon. Respondent states that she had engaged in prostitution for two months (February 1957 to about April 1957) to earn money to pay for an operation and sets out her whereabouts from February 1957 to October 1957. Mr. Amicon who had been a witness at the hearing stated that he met the respondent in October 1957 and to the best of his knowledge she had never engaged in acts of prostitution as long as he had known her.

The material furnished was called to the Board's attention by counsel's brief and reply brief. It was carefully considered by the Board before its order was made. We find no reason to change our previous order.

We note the motion for reconsideration is defective for failure to comply with the regulation (8 CFR 103.5) which requires that the reason upon which the motion is based shall be stated and that information as to whether the validity of the order of deportation has been the subject of judicial proceedings shall be furnished.

The case was thoroughly briefed by counsel and we find no reason advanced to hear oral argument on the motion.

ORDER: It is ordered that the application for oral argument on the motion for reconsideration be and the same is hereby denied.

IT IS FURTHER ORDERED that the motion for reconsideration be and the same is hereby denied.

/s/ THOMAS J. GRIFFIN

Acting Chairman

Mrs. Woodby

(H. R. 15)

* * * * *

(Mrs. Woodby)

Q. When did you leave Summit Court? A. About five years.

Q. And did you leave Summit Court shortly after you ceased having these relations? A. Yes.

Q. And you stated earlier I believe that Mr. Wally threatened you and was reporting you . . . A. Correct.

Q. . . . to these other authorities. I note in your statement here on Page 15 of Exhibit 2, these questions, two questions that I'd like for you to explain, if you will please. Question: "Did Mr. Wally attempt to get you to continue this arrangement after that time?" "Yes." "Did he threaten you in any way?" The answer is, "Not direct." "In what way did he threaten you?" Answer: "First he said he would report me." Question: "To whom did he threaten to report you to?" Answer: "I guess the police." Is that correct? A. To the immigration men. He knew that I wasn't an American citizen.

Q. When you first met him, you have indicated that he took pictures of you. A. Yes, that's correct.

Q. Were these pictures that if they were shown to somebody else would cause you embarrassment? A. I think so.

Q. Were they pictures that were posed without clothing?

(H. R. 18)

* * * * *

(Mr. Amicon)

By Mr. Brown:

Q. Mr. Amicon, when did you meet Mrs. Woodby, approximately when? A. 1957, approximately I think around October.

Mr. Amicon

Q. You stated in this statement that you met her at the place where she works, Neil's Restaurant. A. Yes, sir.

Q. Furthermore, that she was employed there as a waitress, is that correct? A. Yes, sir.

Q. It is noted that you stated that the manner in which you met her was you went there with a friend to eat and the friend knew her and told you about

(H. R. 20)

* * * * *

have sexual relations at that time? A. No, sir, I did not?

Transcriber's Note: Two questions and answers here are unintelligible.

Q. And what is your relationship with her now? A. We're on very good terms.

Q. What? A. On very good terms. I would like to marry this girl if I can get my divorce.

Q. Do you plan to marry her if you get a divorce? A. I've given her a ring.

* * * * *

(H. R. 25)

(Mrs. Woodby)

Q. Did you and your husband and the child have one of the bedrooms? A. Yes.

Q. Was your husband working during that period of time? A. No, sir.

Q. How long did you live in Harlan, Kentucky after you arrived? A. Six or seven months.

Q. And your husband never worked during that time? A. No.

Q. Did he suggest that you leave Harlan, Kentucky, and go someplace else where you could find work? A. No, he did not. I suggested it to him.

Mrs. Woodby

Q. You suggested it? A. Yes, I was expecting my second child.

Q. At that time. When did you deliver your second child?

A. The 13th of August.

Q. What year? Well, you arrived in New York in 1956.

A. The same year.

Q. The same year? In August of 1956 you gave birth to what child? A. Leonard Clarence.

Q. Now, at what time were you still living in Harlan, Kentucky? A. No, because we had been here living with my other sister-in-law.

Q. With your husband's sister? A. Yes.

Q. How long had you been living in Dayton, Ohio, at that time? A. We was moving in an apartment a month before the child was born.

Q. Well, how long had you been in Dayton?

(H. R. 26)

A. We moved from one sister to another sister-in-law.
By Mr. Kusworm:

Q. A short time? A. A short time.

By Mr. Myers:

Q. All right. Now, when you lived with your sister-in-law at Fairborn, was your husband looking for a job?

A. Yes, he was.

Q. Did he ever find a job? A. No, he did not.

Q. And approximately how long did you live with that sister-in-law? A. Through the childbirth it was.

Q. And then you moved into an apartment? A. Yes.

Q. And where was that apartment? A. 528 Notre Dame.

Q. Now, when you were at 528 Notre Dame, was your husband still looking for a job? A. He just find a job before. I get him the job.

Mrs. Woodby

Q. You got him the job? A. Yes. I had to go to the doctor and my sister was taking me to a German doctor. I could not speak English good and I was taken to the German doctor, and I told him my problem and when I come over here and he says he could get a job for my husband.

Q. I see. Now, how long did you live at 528 Notre Dame?
A. About four months.

(H. R. 27)

Q. Four months? And then why did you leave there?
A. I left. As soon as the child was born, the second, my husband took my little girl to Kentucky. When I come out of the hospital I didn't have no job there and the son was injured and still in the hospital, too. At that time my husband worked in a filling station, but he come home about some three or four o'clock in the morning. I didn't know where he was or what he was doing until he gets a registered letter and I asked him for this letter because I decided that I wanted to see it. And he didn't show me the letter, burned it. I don't know where the letter come from. Anyway, we get an argument and I wanted to leave him and the little boy was just come out of the hospital and he said to me, "If you travel, you'll travel without the child." I didn't want to get in any trouble because of me not being a citizen. I'd better let the child go. So, I did. He give me ten dollars and he put me on the bus to go to Pennsylvania to my girl friend what I know from Germany. I went down there, but I returned the next day. The day I come back the child was gone and the apartment was empty. I didn't have no money.

Q. What did you do then? A. I meet a girl.

Q. Then your husband forced you onto the bus almost at gun point? A. Yes, he give me ten dollars and put me on the bus.

Q. And put you on the bus with ten dollars and sent you

Mrs. Woodby

to Pennsylvania to your girl friend's house. And when you got to Pennsylvania you wanted to come back to your little child? A. Yes.

Q. Did you have any money so you could come back?

(H. R. 28)

A. My girl friend gives me the money to come back.

Q. She gave you bus money to come back? A. Yes.

Q. And you came back to Dayton, Ohio, the next day?

A. That's right.

Q. And you went to your apartment on Notre Dame?

A. Yes.

Q. And your husband was gone? A. Yes, and the children.

Q. Both children were gone, too? A. The first child was in Kentucky already. (unintelligible sentence)

Q. I see. Your daughter was in Kentucky when you went to the hospital, and you didn't have anybody to stay with the child. A. That's right.

Q. I see. So you came back to the apartment and he was gone, your child was gone, and everything else was gone. A. I come back from Pennsylvania because the baby was sick with the flu.

Q. Were you sick at that time? A. Yes, I was sick, too.

Q. What was wrong with you? A. I guess it was the aftereffects. I was going back to working and keeping house and everything and I wasn't feeling good. Then the boy was sick and I couldn't take him on the bus. I went to Pennsylvania, but I returned the next day because I know the boy wasn't well, but he was gone, his clothes and everything wasn't there.

Q. Well, where did you live then, when you came back to the apartment?

Mrs. Woodby

(H. R. 29)

A. I stayed in an apartment until I find a job.

Q. Where, in the same apartment on Notre Dame?

A. Yes.

Q. This was a furnished apartment then? A. Yes.

Q. And where did you find a job? A. At McCrory's, the five and ten cent store down town.

Q. All right. How long did you work in McCrory's? A. Three months.

Q. And then where did you go? A. Then I find a job where I am still working now.

Q. At Neil's? A. Neil's Restaurant.

Q. Now, what happened this one day when you received a phone call from your husband? This happened right after you went to work for Neil's? A. Yes.

Q. All right. And you were living on Orchard? A. No, I was living on—this time I had a phone call from my husband I was living at Summit Court. Right behind the place I'm working.

Q. I see and you received a phone call from your husband and what did your husband say? A. He called me and he told me that the boy gets in the hospital and that he don't have any insurance or Blue Cross to pay the hospitalization and the boy needs operation and they won't do it if he's not paying for it and he did not work as I told you and he asked me to send him the money. I asked him how much he needed. And he said \$300. And I told him I don't

(H. R. 30)

have the money and I had not been too good to anybody to ask them for the money. And I just a short time work for my employer and of course (coughing here), but within this time before I got this call I had found a job at McCrory's, I went down to Kentucky. . . .

Mrs. Woodby

By Mr. Kusworm:

Talk to the judge so he can—he wants to hear you.

By Respondent:

A. . . . and brought my little girl with me back to Dayton. She wasn't living with me at the time, see, my husband called me and told me that he needs the money for this operation.

By Mr. Myers:

Q. Did he tell you what kind of an operation the child needed? A. No, he did not.

Q. Did he say it was a serious operation? A. He said it was serious, something about a head injury or something.

Q. So you were put in fear. . . . A. Yes..

Q. . . . at the time, that the child needed an operation and you didn't have any money for the operation. Did you fear that the child might die if he didn't have an operation? A. Yes, I did because I know if I don't help, my husband don't do it because he doesn't have a job and my in-laws don't have money to pay for it.

Q. So you knew that if you didn't get the money for this child there would be no way that the child could get an operation and therefore it might die? A. That's correct.

(H. R. 31)

Q. And this, at that time, was your sole worry, how to get this money to your child?

The Special Inquiry Officer:

Mr. Myers, these questions are tremendously leading. I'd like to hear her story in her own words, rather than yours.

Mr. Myers:

All right. Excuse me. I'm getting carried away because I've gone over it so much, your honor.

Mrs. Woodby

By Mr. Myers:

Q. All right, let me go back then, Mrs. Woodby. What was your feeling when you received the phone call from your husband? You already stated that you knew your husband didn't have any money and he wasn't working and you already stated that your in-laws didn't have any money. Now, tell the court what your feeling was, this is very important. A. I was working part time, I was working from nine o'clock to 1:30 in the afternoon and then went back to work at five till 2:30 in the morning, and I had my little girl with me as I told you. Yeah, I did get a phone call from my husband and he told me that the boy's very sick and that he needs operation, but he can't pay for it, he didn't have no insurance and if I'm a mother now, to get it. And I told him, "I don't have that much to give you." He says, "If you are mother enough, you know how to get it, if you care enough for the child." I told him I'd try.

By Special inquiry Officer:

Q. Let me interrupt you. You said, if you are mother enough you would know how to get the money? A. Yes. It was on the next day (unintelligible).

(H. R. 32)

By Mr. Myers:

Q. What was your feeling—I mean, what did you feel if you didn't get the money, about your child? A. I would have done anything for this child..

Q. Did you feel that the child might die? A. Yes, because as I told you I knew he wasn't very well.

Q. All right. Now, that was one day. When did Tom Wally come into the picture? A. It was right the next

Mrs. Woodby

day after I talked to my husband on the phone the day before.

Q. All right, and then what happened? A. Mr. Wally come to the door and knocked on the door and I opened it. I was crying and he said to me then, "I would like to demonstrate a sweeper," and I told him, I said, "Look, in the first place I could not afford a sweeper and in the second place I have other things on my mind to do much more than buying a sweeper." And he told me, "What are you troubled about?" And I guess—I told you I was alone. He was a stranger, but some times you have to talk to somebody, so I told him. He told me, he says, "How fast do you need the money?" I said, "I need it in a couple of days." He says, "Well," he says, "I'll be right back, then we can talk about it much better." He went outside and come in with a fifth.

By Mr. Kusworm:

Q. A what? A. A bottle.

Q. Of what? A. Of whiskey. I was not drinking at this time and it hit me pretty fast.

(H. R. 33)

By Special Inquiry Officer:

Q. You said it hit you pretty fast? A. The drink. So he told me how I could make the money, how he's going to help me and he's going to give me \$300 now if I work for him. I did not want to do it, but I was thinking about the child I had nicknamed and the child's in the hospital, so I did it. He says, "I put you on," he says, "three months." But I was not planning on it and I did not do it for a living because I work all my life, but I needed that money at that time. As fast as I get it I quit and I told him so.

By Mr. Myers:

Q. Mrs. Woodby, did you work until you got the \$300, is

Mrs. Woodby

that right? A. That's right. Until I paid him the \$300 what he give me.

Q. You paid him back his \$300 and so soon as you paid him back that \$300 did you quit? A. Yes.

Q. Mrs. Woodby, to continue now, you stated that you paid Tom Wally back the \$300. Now, when you paid him back did you stop all that prostitution? A. Yes, I did.

Q. And how long ago was that? A. Four or five years.

Q. Did Mr. Wally approach you after that time to perform other acts for him? A. Yes, he tried.

Q. And what was your answer to him? A. No.

Q. Now, since that time, which you said was approximately four or five years ago, you were living at that time on Summit?

(H. R. 34)

A. Yes.

Q. Now, did you move at that time or approximately at that time? A. Yes, I went down to Knoxville, Kentucky.

Q. Knoxville, Kentucky, or Tennessee? A. Tennessee.

Q. All right. And how long did you stay at Knoxville, Tennessee? A. Three months.

Q. And what were you doing there? A. I was working in the dining room as a waitress in the Brown Derby.

Q. Is that a restaurant? A. Yes.

Q. Do they serve liquor there? A. No, just beer. It's dry.

Q. Now, did you ever engage in any acts of prostitution while living at Knoxville, Tennessee? A. No, I did not.

Q. When you decided not to stay at Knoxville, Tennessee, any more, how did you come back to Dayton? A. Mrs. Jackson. I called her to come down and pick me up. She come down and picked me up.

Mrs. Woodby

Q. And what is her first name? A. Arlene.

Q. Now, approximately what was the date of this that she came to pick you up? A. It was the 4th of July.

Q. In what year?

By Mr. Kusworm:

(H. R. 40)

* * * * *

The Witness: (Arlene Jackson)

A. She called me and told me that she wanted to get back to Dayton and she didn't have any money and so I had a friend of mine take the car and we went down to get her. We brought her back and she stayed with me.

By Mr. Myers:

Q. Where was that? A. On Rugby Road, 1936 Rugby Road.

Q. Now, how long did you live on Rugby Road? A. That was July the 4th and we moved from there in September.

Q. To where? A. We lived at 1500 West Riverview.

Q. Is that the apartment above Neil's? A. Right.

Q. How long did you live together there? A. We lived there until between New Year's—Christmas and New Year's, that would be 1958.

Q. All in all, how long did Mrs. Woodby live with you in the different . . . starting from July the 4th? A. Well, she lived with me from then up to '61, I imagine about February.

Q. That's a period of about two and a half years? A. That's right.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 825

ELIZABETH ROSALIA WOODBY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an alien who admittedly engaged in prostitution after admission to the United States, was held deportable under Sections 241(a)(12) and 212(a)(12) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(12), 1182(a)(12)), which authorize the deportation of "[a]liens who are prostitutes or who have engaged in prostitution." The only question presented by the petition is whether the court of appeals erroneously affirmed the deportation order in light of petitioner's claim that she had engaged in prostitution only for a limited period and under circumstances of financial duress.

(1)

The Special Inquiry Officer, the Board of Immigration Appeals and the court of appeals all assumed, *arguendo*, that circumstances of financial need as alleged by petitioner might constitute a defense to a deportation order based upon acts of prostitution (Pet. 10a-13a, 19a-20a, 5a-7a). The Special Inquiry Officer and the Board of Immigration Appeals found, however, that petitioner had continued her practice of prostitution for a considerable period after her financial obligation—the repayment of a \$300 loan to a salesman who acted as her procurer—had been satisfied (Pet. 13a, 19a), and the court of appeals held that this finding was supported by substantial evidence (Pet. 7a). Thus while petitioner's financial obligation was admittedly satisfied by July 1957 (Pet. 4a), one witness testified, for example, that he had been invited by petitioner to her apartment for the purpose of prostitution in December, 1957 (Pet. 17a). In these circumstances, there is no occasion for further review of the finding that petitioner had continued to engage in prostitution well after any financial duress had been removed.

Petitioner also asserts (Pet. 17-19) that the court of appeals should have remanded the proceedings for the purpose of adducing additional evidence relating to the duration of petitioner's involvement in prostitution. Petitioner, who has been represented by counsel throughout, had an opportunity to present such evidence both at a preliminary interrogation and at the hearing before the Special Inquiry Officer. She further gave her version of the relevant facts in an affidavit submitted to the Board of Immigra-

tion Appeals upon her motion for reconsideration. In denying that motion, the Board stated that the affidavit merely repeated matters which had previously been considered (Pet. 22a). The denial of the motion to reopen the proceedings was clearly within the Board's discretion and petitioner now suggests no new relevant evidence justifying a further hearing.¹

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1966.

¹ Even though no application for such relief was made, the Special Inquiry Officer considered petitioner's eligibility for adjustment of status under Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) and waiver of inadmissibility for prostitution under Section 212(g) of the Immigration and Nationality Act, now redesignated Section 212(h) (8 U.S.C. 1182(h)). However, since petitioner's citizen children were in the legal custody of their grandparents, he found that petitioner's deportation would not result in hardship to them (Pet. 13a). Petitioner has never questioned this finding in any subsequent administrative or judicial proceedings. Investigations of the Immigration and Naturalization Service, not shown in the record, indicate that petitioner's attempts to regain custody of her children have been unsuccessful and that, as of September 29, 1965, the children were still in the legal custody of their grandparents, pursuant to court order. Petitioner's husband is deceased (Pet. 8a).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No.

JOSEPH SHERMAN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Joseph Sherman petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit sustaining an order for petitioner's deportation.

OPINIONS BELOW

The opinion of the three-judge panel which first decided the case (R. 57a-70a; Appendix A, *infra*), holding that the deportation order should be set aside, is reported in 350 F.2d 894. The opinion of the court en banc affirm-

ing the deportation order on the government's petition for rehearing (R. 83a; Appendix B, *infra*) has not yet been reported.

JURISDICTION

The judgment of the court below (R. 85a; Appendix D, *infra*) is dated and was entered on January 17, 1966. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

In a deportation proceeding against a long-time resident alien, must the government prove the facts on which the deportability depends by more than a bare preponderance of the evidence?

STATUTES INVOLVED

§ 242(b) of the Immigration and Nationality Act, 8 U.S. Code § 1252(b), provides in part:

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

§ 106(a)(4) of the Immigration and Nationality Act, as amended, 8 U.S. Code § 1105(a)(4), provides in part:

". . . the petition [for review of a deportation order] shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

STATEMENT OF THE CASE

Joseph Sherman, the petitioner, was born in Poland in 1906. In 1920, aged 14, he entered the United States in the company of his mother and three sisters and was admitted for permanent residence. (R. 58a.)

On March 14, 1963, the Immigration and Naturalization Service instituted deportation proceedings against petitioner, alleging that on December 20, 1938, he had reentered the United States without inspection and was therefore deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S. Code § 1251(a)(2) (R. 1a).¹

It was the Service's theory at the administrative hearing that petitioner had left the United States in June 1937, in order to fight on the loyalist side in the Spanish civil war, and had returned to the United States in December 1938, bearing a passport issued under the name of Samuel Levine (R. 1a-2a).

The Service introduced evidence that in June 1937, petitioner applied for and received a United States passport under the name of Samuel Levine. It was established that someone traveled to Europe on this passport in June 1937, aboard the SS *Acquitania*, and that someone entered the United States on this passport on December 20, 1938, aboard the SS *Ausonia*. There was no evidence identifying petitioner as the individual or individuals who had traveled on the passport. (R. 60a.)

The only evidence that petitioner had ever left the United States was the testimony of Edward Morrow, given in February and June 1964, twenty-seven years after the events to which it pertained (R. 3a; Tr.² 36-65, 77-103).

Morrow had served with the loyalist forces in Spain from about June of 1937 to about December 1938. He had left the United States in June 1937 aboard the SS *Acquitania* and had returned in December 1938 aboard the SS

¹ The Order to Show Cause, which initiated the proceeding, is contained in the administrative record, which was not printed below (see 8 U.S. Code § 1105a(8)), and which has been filed with this Court.

² "Tr." refers to the transcript of the administrative proceeding.

Ausonia. In April 1963, an investigator for the Immigration and Naturalization Service showed Morrow the passport photograph (and its enlargement) of "Samuel Levine." Morrow told the investigator "that the person represented thereon appears vaguely familiar to him and believes he may have been on the 'Acquitania' sailing with him in June 1937. However, he could not recall anything specific regarding that person and could not further identify him. When asked if the name Joseph or Joe Sherman or Samuel or Sam Levine had any significance to him, or if a person bearing such name had been on the SS 'Acquitania' trip abroad in June 1937 or on the SS 'Ausonia' return voyage in December 1938, with him, he stated that he could not recognize the name. When furnished additional background data regarding the subject, he again advised that he could not tie it in with the person represented by the photograph." (R. 45a-46a, 3a.)

On February 25, 1964, just before testifying at the administrative evidentiary hearing, Morrow secretly observed petitioner for about half an hour. Morrow then testified that he had seen petitioner in Spain at least 20 times, that petitioner then had the name "Samuel Levine," and that petitioner had been on the SS Ausonia on his return voyage to the United States, but that he did not know whether petitioner had traveled to Spain with him. (R. 3a-4a, 10a.) Morrow also testified that he could not recall having had "any personal contact" with petitioner, that petitioner was not in his unit, that he could not identify any particular occasion on which he had seen petitioner, that he did not recall having been introduced to petitioner, and that he could not say how he knew that petitioner's name was "Levine." (R. 3a-4a, 10a, 13a, 15a, 20a-21a.) Morrow showed a failure of recollection concerning other events and persons in Spain, and his memory was extremely faulty even with regards to his interview in April 1963 with the Service investigator (R. 20a-25a, 29a). Morrow admitted that it was possible that his identification of petitioner was mistaken (R. 20a). When Morrow was asked,

"You are positive you saw this man in Spain?", he replied, "Positive - No. But I feel that I saw this man in Spain" (R. 21a).

The Special Inquiry Officer sustained the charge against petitioner and ordered his deportation. The Board of Immigration Appeals affirmed. (R. 60a.)

On review by the Second Circuit pursuant to 8 U.S. Code § 1105a, the case was first heard by a three-judge panel consisting of Circuit Judges Waterman, Friendly and Smith. On September 22, 1965, the panel, Judge Friendly dissenting, issued a decision setting aside the deportation order and remanding the case to the Immigration and Naturalization Service. (R. 57a-70a.) The majority held that in deportation cases *against long-time resident aliens only* the government has a "higher burden of persuasion" than the ordinary civil rule that "the party having the burden of proof need only prove the existence of facts on which he relies by a preponderance of evidence" (R. 64a). The majority ruled that the government's burden in such cases is to prove its case "beyond a reasonable doubt" (R. 66a-67a). The court stated, "It seems clear that due process requires that there be *some* test by which the fact finder can ascertain whether a fact does or does not exist in every legal proceeding" (R. 65a). The court considered irrelevant to this issue §§ 242(b) and 106(a)(4) of the Act, *supra*, p. 2, requiring that deportation orders be "based upon reasonable, substantial, and probative evidence," and, if so supported, to be "conclusive" (R. 62a-63a).

The court stated (R. 66a-67a):

"... as to certain issues, courts have been free to conclude that it is fair and just to require a litigant in a civil action to carry a somewhat heavier burden of persuasion than litigants are required to bear as to the issues in most civil actions. . . . In some civil actions courts have even required that one party carry the burden usually borne by the prosecution in criminal proceedings. We have concluded

that the present case exemplifies a type of proceeding in which courts should require the Government to carry such a heavy burden. The petitioner entered the United States in 1920. The Government now seeks to deport him alleging that the petitioner left the country in 1937 and reentered without inspection in 1938. If the Government prevails, petitioner will be forcibly expelled from this country and returned to Poland which is in no meaningful sense his country now. We do not say that the Government should not be able to proceed against petitioner after so long a time. We do hold that the Government is required to establish that it is almost certainly true that petitioner entered the United States without inspection in 1938; in other words, the Government must prove beyond a reasonable doubt the facts upon which the deportation depends.

"We wish to stress that we do not hold this higher burden is imposed on the Government in all deportation cases. It is for the Board of Immigration Appeals to decide in the first instance when the rule we announce today relating to proceedings involving long-time resident aliens applies, and we wish to stress that the rule will not expand the scope of judicial review of agency determinations. The purpose of the rule is to impress upon the agency the grave nature of the task it performs. Although repeated attempts to redefine the term 'beyond a reasonable doubt' may simply 'aid the purposes of the tactician,' we are confident that the imposition of this requirement will have the salutary effect of causing the Board to proceed carefully in extreme cases such as the case now before this court. All we can require is that the special inquiry officer and the Board conscientiously ask whether the facts on which the deportation of a long-term resident alien depends are almost certainly true. If these administrators do so proceed the scope of review will remain limited to an inquiry whether the final order of deportation is supported by reasonable, substantial, and probative evidence on the record considered as a whole."

Judge Friendly, dissenting, stated (R. 68a):

"If the slate were clean, I might well agree that the standard of persuasion for deportation should

be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail."

Judge Friendly considered, however, that the rule announced by the majority was foreclosed by §§ 242(b) and 106(a)(4) of the Act.

The court ordered an en banc rehearing on the government's petition, and a majority voted to sustain the deportation order for the reasons stated in Judge Friendly's dissenting opinion. Judges Waterman and Smith dissented for the reasons stated in the majority opinion of the panel which had originally heard the case. (R. 83a.)

REASONS FOR ALLOWING THE WRIT

The issue in this case is whether, in deportation cases against long-time resident aliens, the government must prove the facts of deportability by something more than a bare preponderance of the evidence. Such a higher standard might be, as Judge Friendly suggested, the same as the judge-made rule in denaturalization cases, that the evidence must be "clear, unequivocal and convincing" and more than a "bare preponderance of the evidence." *Schneiderman v. United States*, 320 U.S. 118, 125; *Chaunt v. United States*, 364 U.S. 350, 353. Or, as Judges Waterman and Smith held, the rule might be as in criminal cases, that of proof "beyond a reasonable doubt."

The question is obviously of great importance to the administration of the deportation laws and to the rights and security of millions of resident aliens. That the question is substantial and far from settled appears from the opinion of Judges Waterman and Smith and even from the opinion of Judge Friendly, adopted by the majority of the en banc court.

Judge Friendly recognized that the denaturalization standard might well be correct in cases involving long-

time resident aliens "if the slate were clean" (R. 68a). He was wrong, however, in believing that Congress had conclusively written on the slate by providing in §§ 242 (b) and 106(a)(4) that deportation orders are valid only if "based upon reasonable, substantial, and probative evidence" and, if so supported, are "conclusive." These statutory provisions do not locate or define the burden of proof. If Judge Friendly's view were pushed to its logical conclusion, deportation orders supported by substantial evidence would be invulnerable on judicial review even if the Attorney General had placed on the alien the burden of proving that he was not deportable.

Furthermore, the provision that a deportation order is conclusive on judicial review if supported by substantial evidence is not much different than the standard of appellate review of the sufficiency of the evidence in criminal convictions. Yet it has never been thought that the appellate standard is inconsistent with the requirement that in criminal trials guilt must be proven beyond a reasonable doubt.

Finally, §§ 242(b) and 106(a)(4) require not merely that the evidence be "substantial," but also that it be "reasonable" and "probative." Considering the consequences of deportation to the alien and his family, the absence of a statute of limitations, and the number and nature of the grounds for deportation, "reasonable" evidence in a proceeding against a long-time resident alien can only be such as carries a high degree of certainty — evidence which produces a "solidity of proof." *Rowoldt v. Perfetto*, 355 U.S. 115, 120. Because deportation of a long-resident alien is an extreme disruption of personal liberty and human rights, it should be governed by a stricter rule than that which prevails in a routine suit for property damage or in a proceeding to expel a recent stowaway.

The facts here illustrate the need for a higher standard than a bare preponderance of the evidence in cases involving long-resident aliens. Petitioner entered this

country as a child. He has had his home here for 46 years. His family and roots are here. As Judge Waterman's opinion points out, he is being expelled to a land "which is in no meaningful sense his country now," and his banishment represents "a penalty that surpasses in its enormity many imposed by the criminal law." Petitioner has been exiled on a finding that he left the country to fight fascism in Spain and illegally reentered more than a quarter of a century ago. The case against him depends on an uncertain, belated identification by a witness testifying to casual observations of twenty-seven years before in a manner inconsistent with his prior statement to a Service investigator (see *supra*, pp. 4-5). It has elsewhere been remarked of testimony which proposed to go back for twenty years, that the witnesses "would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection." *United States v. Chase*, 135 F. Supp. 230, 233. See also *Nowak v. United States*, 356 U.S. 660, 667.

It may be that the dream-like testimony in this case constituted a "preponderance of the evidence," but it is shocking that it should be enough to uproot and exile this long-resident alien.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A - OPINION OF 3-JUDGE PANEL

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 521—September Term, 1964.

(Argued June 9, 1965 Decided September 22, 1965.)

Docket No. 29487

Joseph Sherman,

Petitioner,

—v.—

Immigration and Naturalization Service,

Respondent.

Before:

Waterman, Friendly and Smith,

Circuit Judges.

By his petition brought pursuant to 8 U.S.C. §1105a(a) to review a final order of deportation issued by the Immigration and Naturalization Service petitioner seeks reversal of that order. Deportation order set aside and case remanded to the Service for its reconsideration in the light of the standard of proof set forth in our opinion.

* * *

Waterman, Circuit Judge:

This case arises upon a petition to review a final order of deportation by the Immigration and Naturalization Service holding the petitioner deportable under Section 241 (a)(2) of the Immigration and Nationality Act of 1952. 8

U.S.C. §1251(a)(2). We have jurisdiction to review this final order under Section 106(a) of the Act. Immigration and Nationality Act of 1952, §106(a) as amended, 75 Stat. 651 (1961), 8 U.S.C. §1005a(a). *Foti v. I. N. S.*, 375 U.S. 217 (1963).

The petitioner, an alien, was born in 1906 in Warsaw, Poland. In 1920 he came to the United States and was admitted for permanent residence along with his mother and three sisters. The petitioner contends that the Government has now shown that he has not remained continuously in the United States ever since. The Government, however, seeks to prove that the petitioner traveled to France in June of 1937 using a United States passport issued in the name of Samuel Levine and returned to the United States on or about December 20, 1938 using this same passport, in this manner avoiding the inspection given to all aliens upon arrival in the United States. The Immigration and Nationality Act of 1952 provides that an alien in the United States who entered "without inspection" shall be deported upon the order of the Attorney General. 8 U.S.C. §1251(a)(2). As there is no time limit on the operation of this section it is possible for the Attorney General to deport aliens who have been residents for a long period but who last entered the country without inspection. For example, this section permitted the Government to proceed against the petitioner in 1963 alleging an entry without inspection almost twenty-five years earlier.¹ One might wish that the law had taken a different turning, but for better or worse Congress has determined that in order to implement the policy of alien inspection it is necessary to make an alien not properly inspected subject to deportation at any time.

¹ Prior to 1952 the Government had only five years after an alleged illegal entry in which to commence proceedings. In the petitioner's case this period expired in 1943. Thus until the 1952 Act, eliminating all statutes of limitation in deportation proceedings, was passed, petitioner could not have been proceeded against. See Gordon & Rosenfield, *Immigration Law and Procedure* §4.6b (1959).

Therefore, if the Government's factual contentions are sustained the petitioner can be deported.

The Government "undertook to show affirmatively" that the petitioner had entered the United States in 1938 without inspection² Once the Government chose to proceed in this manner, established rules of evidence instruct us that it assumed the burden of persuasion on this issue; that is, the Government assumed the burden of proving the existence of the facts which impose the legal consequences the Government sought to invoke. See McCormick, *Evidence* §307 (1954). The Government did offer evidence tending to show entry without inspection in 1938, which evidence is precised in the margin.³ The petitioner elected not to

² The Government might have proceeded on a different theory. The petitioner refused to identify the record of entry of Chomia Szorman on August 8, 1920 as a record of his entry into the United States. As a consequence the time, place and manner of petitioner's entry into the United States were never officially documented. The Board of Immigration Appeals accepted it as proven that petitioner had entered the United States in 1920. Nevertheless, the Government suggests in its brief that since the record of entry of Chomia Szorman was never received in evidence the Government was in a position to take advantage of the presumption contained in §291 of the Act. 8 U. S. C. §1361. Section 291 provides *inter alia* that in any deportation proceeding the burden of proof is on the alien to show the "time, place and manner of his entry into the United States." If this burden is not sustained, Section 291 goes on to state that the alien shall be presumed to be in the United States "in violation of law." If this presumption obtained in the present case it would be unnecessary for the Government to prove entry without inspection in 1938. But the Government did not proceed in the manner just outlined. No doubt it recognized the petitioner's lawful entry into the United States in 1920 had for all practical purposes been established. See *Sherman v. Hamilton*, 295 F.2d 516, 518 (1 Cir. 1961).

³ The Government introduced evidence establishing that in June of 1937 petitioner had applied for and received a United States passport under the identity of Samuel Levine. It was also established that someone using the name Samuel Levine traveled to Europe on this passport aboard the SS Acquitania

[Continued, next page]

introduce any evidence and rested content after cross-examining the Government's chief witness in an attempt to weaken the probative force of his testimony.⁴ At the statutorily required hearing the special inquiry officer found on this evidence that petitioner was deportable for having entered the United States without inspection. Petitioner sought administrative review by the Board of Immigration Appeals of this determination. The Board made its own independent determination of all the disputed factual issues as is its practice,⁵ and reached a conclusion identical to that reached by the special inquiry officer. From all that appears in the record neither the special inquiry officer nor the Board paid any heed to the degree of belief that they were required to reach before they could find for the Government, other than to assume tacitly that the Government was simply required to establish the facts on which

[Fn. 3, continued]

in June of 1937 and that someone using the name Samuel Levine returned to the United States on this passport aboard the SS Ausonia and arrived in this country on or about December 20, 1938. This evidence, of course, did not conclusively establish that Sherman was the individual so using the passport. The only direct evidence tending to prove that petitioner left the United States in 1937 and returned in 1938 is the testimony of Edward Morrow who testified that he recognized petitioner as one of the persons who had served with him in the Spanish Civil War and that he recognized petitioner as one of the passengers on board the SS Ausonia on its return to the United States on December 20, 1938.

⁴ During the extensive cross-examination of Morrow it was stressed that Morrow was testifying to his ability to identify someone he claimed to have met but briefly some twenty-seven years ago; that Morrow admitted to having no "personal contact" in Spain with the individual he claimed was the petitioner; that Morrow when first shown the 1937 passport photograph of "Samuel Levine" did not identify it as the individual he had met in Spain; and that he could not positively identify petitioner as the individual he had met in Spain.

⁵ See Gordon & Rosenfield, *Immigration Law and Procedure* §1.10e (1959).

it relied by a "preponderance of the evidence." It is the petitioner's contention that the Board's decision must be reversed because a higher degree of persuasion is required.

The essence of petitioner's claim is that even though deportation is not a criminal penalty it is a penalty to which serious consequences frequently attach and consequently the requirements of due process in deportation proceedings should be elaborated by analogy to the criminal law rather than to the law of economic regulation. In particular, petitioner contends that in his case the degree of belief which must exist before the Board of Immigration Appeals can conclude that the facts on which deportation depends are true should be defined as it is in criminal cases.⁶ Petitioner does not argue that due process requires the fact finder to have a degree of belief "beyond a reasonable doubt" in all deportation proceedings. He does contend that in such proceedings there is a distinction between the due process due an alien who has resided in this country for a long period of time and that due an alien who only recently came to this country. In the former situation petitioner claims that deportation is tantamount to banishment and that considerations of fairness imbedded in the concept of due process requires that the Government prove its case beyond a reasonable doubt if it is to succeed.

Even a sympathetic reading of the Government's brief indicates that it largely misunderstands petitioner's argument. The Government invites us to examine the rec-

⁶ Although the petitioner's brief never says so in so many words, it is clear that in directing our attention to the degree of belief required in criminal cases petitioner refers to the common assertion that in a criminal proceeding the burden is on the prosecution to prove beyond a reasonable doubt all elements of the crime of which the defendant is accused. See 9 Wigmore, *Evidence* §2497 (3d ed. 1940). See generally McBaine *Burden of Proof: Degree of Belief*, 32 Calif. L. Rev. 242 (1944).

ord of the administrative proceedings below and argues that the present deportation order must be sustained as it is based on "reasonable, substantial, and probative evidence." In support of this position the Government draws our attention to Section 242(b)(4), 8 U.S.C. §1252(b)(4), and Section 106(a)(4), as amended, 75 Stat. 651 (1961), 8 U.S.C. §1105a(a)(4), of the Immigration and Nationality Act of 1952. Section 242(b)(4) provides *inter alia* that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." And Section 106(a)(4) states that a deportation order, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."⁷ Section 106(a)(4) is clearly a general description of the standard of judicial review that governs this and other federal appellate Courts in reviewing final orders of deportation under Section 106(a); that is, the question for the appellate court in reviewing an agency resolution of a disputed factual question is whether there was substantial evidence on the whole record to support the agency's finding. And even though Section 242(b) appears in a section of the Act prescribing agency procedures it is best understood as a restatement of the proper standard of judicial review and a reminder to the Board that final orders of deportation must be based on substantial evidence.⁸ The Government apparently believes that these sections require a decision in its favor. In our opinion, neither section is relevant to a determination of the issue presently before this court.

The question raised by petitioner's claim concerns the degree of belief that must exist before the Board may conclude that an assertion of fact on which the Government has the burden of proof is true. Such a question is a ques-

⁷ See generally Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record."* 64 Harv. L. Rev. 1233 (1951).

⁸ Gordon & Rosenfield, *Immigration Law and Procedure* §8.12c (1959).

tion of law for a court to decide regardless of how reasonable the Board's resolution of the disputed factual issues in this case may have been. It might be argued, of course, that the Board resolved this question of law against the petitioner and this resolution should not be disturbed by this court on appeal. From the record, however, it is not clear that the Board did advert to the problem.⁹ And even if we assume that the Board did rule against the petitioner on this question of law we are not thereby foreclosed from reconsidering the question. There is no indication in the Act that Congress intended the Board to decide what degree of persuasion was appropriate in the case of a long-time resident alien threatened with deportation.¹⁰ Indeed, there is no indication in the Act that Congress adverted in any way to the problem of the degree of persuasion imposed upon the Government in deportation proceedings. The question raised by this petition concerns the degree of persuasion constitutionally required or otherwise appropriate in deportation proceedings involving long-time resident aliens, and this is a question especially meet for judicial determination.

It is open to us to hold against the petitioner since the Supreme Court has repeatedly stated that deportation proceedings are civil in nature,¹¹ and ordinarily in civil ac-

⁹ No discussion of this problem, as such, is contained in the Board's opinion. For the most part the Board simply credited the testimony of the government witnesses. It then concluded that this testimony was sufficient to establish the facts on which deportation depends.

¹⁰ If the Act evinced a Congressional desire to leave to the administrative agency the choice between the various degrees of persuasion potentially applicable in deportation proceedings we would be inclined to hold that the question was not meet for judicial determination even though it was a question of law.

¹¹ See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Bilokumsky v. Tod*, 263 U.S. 149 (1923); *Bugajewitz v. Adams*, 228 U.S. 585 (1913); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

tions the party having the burden of proof need only prove the existence of facts on which he relies by a preponderance of the evidence. 9 Wigmore, *Evidence* §2498 (3d ed. 1940). We do not believe, however, that we are required to conclude the present case in such a syllogistic fashion. As the Court insists that deportation proceedings are civil we are precluded from reclassifying them as criminal, and, having thus reversed the major premise, then holding the degree of belief required in such proceedings is that which is required in criminal prosecutions. We are not, however, precluded from considering whether the Government should bear a higher burden of persuasion when it attempts to deport a long-time resident alien regardless of whether the proceeding is civil or criminal in nature. Because the realm of evidence law is one in which courts are especially expert,¹² and because rules regulating the degree of persuasion are traditionally judge-made,¹³ we believe that we may consider whether wisdom and justice require that the Government bear a higher burden of persuasion in the present case.

It seems clear that due process requires that there be some test by which the fact finder can ascertain whether a fact does or does not exist in every legal proceeding.¹⁴ Perhaps due process also requires that in certain criminal proceedings threatening serious penalties the prosecution demonstrate that the facts on which guilt depends are almost certainly true; that is, that the jury must be-

¹² See 77 Harv. L. Rev. 556-59 (1964).

¹³ See generally McBaine, *supra* note 6. Professor McBaine assumes throughout his excellent article that the elaboration of rules regulating the degree of belief required in a given proceeding is the province of the judge. Of course, judges will often be constrained by precedent. But we are acquainted with no precedent that bears directly on the issue as we have formulated it on this appeal.

¹⁴ See McBaine, *supra* note 6, at 244.

lieve beyond a reasonable doubt that these facts exist before it can find for the prosecution. Having come this far it would not be a long step to conclude that this same higher degree of persuasion is constitutionally required in deportation proceedings involving aliens who have resided in the United States for a long period of time because in such a case forcible expulsion would be tantamount to banishment—a penalty that surpasses in its enormity many imposed by the criminal law. We have nevertheless concluded that petitioner's constitutional claim should be rejected. Neither of the cases cited by petitioner convince us that the Court has announced the constitutional rule petitioner urges us to apply in the present case. Petitioner argues that in *Rowoldt v. Perfetto*, 355 U.S. 115 (1957) and *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) the Court announced that due process requires the administrative agency to believe beyond a reasonable doubt that the facts on which deportation depended are true. Both *Rowoldt* and *Gastelum-Quinones* involved the threatened deportation of individuals alleged to be members of the Communist party within Section 241(a)(6)(C) of the Act. 8 U.S.C. §1251(a)(6)(C). In both cases the Court reversed, holding the evidence of record did not demonstrate "meaningful" association. Although the issue is not free from doubt, we believe that in these cases the Court held that only individuals who "meaningfully" belonged to the Communist party could be deported under Section 241(a)(6)(C) and reversed because no evidence had been introduced establishing meaningful association—an essential element in the Government's case. The Court did not say in those cases that due process required that the Government prove the facts on which deportation there depended—meaningful membership—beyond a reasonable doubt. Whether due process does so require is still an open question, which we feel we should avoid because we can hold for the petitioner on a nonconstitutional ground.

As we have previously noted, the rules regulating the degree of persuasion in legal proceedings are tradition-

ally judge-made. Thus, as to certain issues, courts have been free to conclude that it is fair and just to require a litigant in a civil action to carry a somewhat heavier burden of persuasion than litigants are required to bear as to the issues in most civil actions. 9 Wigmore, *Evidence*, §2498 at 329 (3d ed. 1940). In some civil actions courts have even required that one party carry the burden usually borne by the prosecution in criminal proceedings. See, e.g., *Admire v. Admire*, 180 Misc. 68, 42 N.Y.S.2d 755 (Sup. Ct. 1943) (necessary to prove nonaccess beyond reasonable doubt in overcoming presumption of legitimacy). We have concluded that the present case exemplifies a type of proceeding in which courts should require the Government to carry such a heavy burden. The petitioner entered the United States in 1920. The Government now seeks to deport him alleging that the petitioner left the country in 1937 and reentered without inspection in 1938. If the Government prevails, petitioner will be forcibly expelled from this country and returned to Poland, which is in no meaningful sense his country now. We do not say that the Government should not be able to proceed against petitioner after so long a time. We do hold that the Government is required to establish that it is almost certainly true that petitioner entered the United States without inspection in 1938; in other words, the Government must prove beyond a reasonable doubt the facts upon which deportation depends.

We wish to stress that we do not hold this higher burden is imposed on the Government in all deportation cases. It is for the Board of Immigration Appeals to decide in the first instance when the rule we announce today relating to proceedings involving long-time resident aliens applies, and we wish to stress that the rule will not expand the scope of judicial review of agency determinations. The purpose of the rule is to impress upon the agency the grave nature of the task it performs. Although repeated attempts to redefine the term "beyond a reasonable doubt"

may simply "aid the purposes of the tactician,"¹⁵ we are confident that the imposition of this requirement will have the salutary effect of causing the Board to proceed carefully in extreme cases such as the case now before this court. All we can require is that the special inquiry officer and the Board conscientiously ask whether the facts on which the deportation of a long-term resident alien depends are almost certainly true. If these administrators do so proceed the scope of review will remain limited to an inquiry whether the final order of deportation is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

Petitioner contends that we should go on to weigh the evidence against this higher standard and urges that in this light the evidence is insufficient to support a final order of deportation. We cannot agree. The requirement we have announced today is directed at the finder of facts, not the appellate court. Our only course is to dissolve the final order of deportation and remand for further proceedings not inconsistent with this opinion.

Deportation order set aside and case remanded to Immigration and Naturalization Service.

¹⁵ 9 Wigmore, *Evidence* §2497, at 320 (3d ed. 1940).

Friendly, *Circuit Judge* (dissenting):

Appealing as is my brothers' desire to ease the rigors of a statute that permits deportation twenty-five years after the cause,¹ I am unable to find the requisite authority on our part. Moreover, I fear that imposing a special judicially prescribed burden of persuasion on an ill-defined group of cases will introduce confusion and uncertainty into deportation law.

If the slate were clean, I might well agree that the standard of persuasion for deportation should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be "clear, unequivocal, and convincing" and that the Government needs "more than a bare preponderance of the evidence" to prevail. *Schneiderman v. United States*, 320 U.S. 118, 125 (1943); *Chaunt v. United States*, 364 U.S. 350, 353 (1960). But here Congress has spoken, most pertinently in §242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1252(b), where it directed the Attorney General to make regulations requiring that

"no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

This provision overruled earlier indications that had been taken to recognize a lower quantum of proof as sufficient. See *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927) ("some evidence" sufficient to sustain deportation order against attack in habeas corpus); Note, *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 698 (1953); Gordon & Rosenfield, *Immigration Law and Procedure* §8.12c (1959). Standing alone, this direction to the Immigration Service to apply a higher standard than

¹ It should not be forgotten that Congress has provided a method of relief for such cases, 8 U.S.C. §1254, which petitioner, for reasons best known to himself, has declined to pursue.

had previously been thought permissible might not preclude the courts from insisting on a still higher one in certain types of cases. But Congress made rather plain that, in raising the standard, it did not intend the courts to have liberty to effect further elevations. The House Report on the Immigration and Nationality Act, 2 U. S. Code Cong. & Ad. News (1952) 1653, 1712, stated:

"The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below."

The intention thus expressed was enacted in 1961, 8 U. S. C. §1105(a)(4):

"Judicial Review of Orders of Deportation and Exclusion.

"[T]he Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

The standard of "reasonable, substantial, and probative evidence" thus applies in all deportation cases—both to the Service and to the courts.

It is true that the substantial evidence rule itself is "quite malleable and permits wide variances in judicial practice." Gordon & Rosenfield, *supra*, at 857; see also 4 Davis, Administrative Law Treatise §29.02 at 126 (1958), and 1965 pocket part. But cf. *NLRB v. Walton Mfg. Co.*, 369 U. S. 404, 407 (1962). And the Supreme Court has spoken of the "solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years." *Rowoldt v. Perfetto*, 355 U. S. 115, 120 (1957). Granting all this, I perceive no proper basis under the statutory standard for reversing the or-

der here under review; indeed, by remanding the case rather than setting the order aside, my brothers necessarily concede the evidence to have been sufficient even under the reasonable doubt standard they would apply.

If, as has been urged, deportation of a long-time resident should be treated as a penal sanction, my brothers' conclusion might indeed follow on constitutional grounds. But, as they recognize, an inferior court cannot take that step so long as *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913), *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952), *Galvan v. Press*, 347 U.S. 522 (1954), and other Supreme Court decisions remain the law.

I would deny the petition.

APPENDIX B - OPINION OF COURT EN BANC

* * *

(Rehearing *in banc*
taken on submission
December 23, 1965

Decided January 17, 1966.)

* * *

Before:

Lumbard, *Chief Judge*,
Waterman, Moore, Friendly, Smith, Kaufman,
Hays and Anderson, *Circuit Judges*.

Petition to review a final order of deportation. Petition denied.

* * *

Per Curiam:

The Immigration and Naturalization Service having moved for rehearing *in banc*, and a majority of the judges in regular active service having voted to reconsider the case *in banc* and having given the parties an opportunity

to submit further briefs, upon consideration by the court *in banc* the petition of Joseph Sherman to review the order of the Service is denied, for reasons stated in Judge Friendly's dissenting opinion, 350 F.2d at 900. Judges Waterman and Smith dissent and vote to grant the petition and set aside the deportation order for reasons stated in Judge Waterman's opinion, 350 F.2d 894.

APPENDIX C - THE JUDGMENT BELOW

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of January, one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,

Circuit Judges.

Joseph Sherman,

Petitioner,

v.

Immigration and Naturalization Service,

Respondent.

A petition for review of an order of the Immigration and Naturalization Service.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said petition be and it hereby is denied.

**/s/ A. Daniel Fusaro
Clerk**

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1090

JOSEPH SHERMAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the panel of the court of appeals (Pet. App. 11-24) and the *per curiam* opinion of the court of appeals sitting *en banc* (Pet. App. 24-25) are reported at 350 F. 2d 894.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1966. The petition for a writ of certiorari was filed on March 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a deportation proceeding against a resident alien, the government has sustained its bur-

den of proof where the findings of fact of the Special Inquiry Officer are supported by reasonable, substantial, and probative evidence.

STATEMENT

Petitioner is a sixty-year-old alien, a native of Poland, who entered the United States for permanent residence in 1920 (Tr. 2; T6, pp. 1-3).¹ In March 1963, petitioner was ordered to show cause why he should not be deported on the ground that he had last entered the United States on December 20, 1938, without inspection as an alien as required by Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) (T5).

In a hearing before a Special Inquiry Officer, the evidence showed that petitioner was in the United States on June 10, 1937, at which time he applied for and received a United States passport under the name of Samuel Levine (Tr. 11-26; T9; T10).² A man using the name of Samuel Levine used this passport to travel aboard the SS Aquitania from New York to France, arriving in France on June 22, 1937 (T17). The passport was presented for inspection by French officials on arrival in France (T10) and was subse-

¹ References preceded by "Tr." are to the pages of the hearing transcript, which is tab 4 of the administrative record. References preceded by "T" are to the numbered tabs of the administrative record. T1 is the opinion of the Board of Immigration Appeals. T3 is the opinion of the Special Inquiry Officer.

² The application for a passport contained a picture of petitioner and a description to fit him detailed to the point of showing a scar on the back of the right hand (Tr. 17, 25-26, 29-30; T9). The passport also contained a picture of petitioner and the same description (T10).

quently endorsed by American consulate officers in Barcelona, Spain, in early December 1938 (T19). "Samuel Levine" returned to the United States aboard the SS Ausonia, on a voyage originating at Le Havre on December 10, 1938 (T20) and terminating at New York on December 20, 1938 (T13). His destination upon entry was 403 Chester Street, Brooklyn, New York (T13), the address of petitioner's parents (T6, Exh. E).

Edward Morrow, an American citizen who went to Spain in 1937 to fight in the Spanish Civil War for the Loyalists, identified petitioner as the person who traveled under the passport bearing the name of Samuel Levine (Tr. 36, 44, 48-51, 53-62, 83-89). Morrow testified that he recognized petitioner as the person he had known as Sam Levine, who had been in Spain in 1937 and 1938 and had participated with him in the Spanish Civil War (Tr. 37, 53-62, 91, 97-101). Morrow admitted there was a possibility that he was mistaken in his identification, but said that he did not believe he was (Tr. 99-100). Morrow also recognized petitioner as being on the SS Ausonia for the voyage reaching New York from France about December 20, 1938 (Tr. 38, 52).³

The government's evidence was uncontroverted, petitioner having elected not to introduce any evidence. Petitioner relied primarily on cross-examination of Morrow to cast doubt on his identification of petitioner as the "Sam Levine" he had seen in 1937 and 1938.

³ The ship manifest shows that both "Sam Levine" and Morrow were on that voyage (Tr. 39-40; T20).

The Special Inquiry Officer, noting that the burden of establishing deportability by reasonable, substantial and probative evidence was on the government (T3, p. 2), found that the government had established with a "solidarity far greater than required" that petitioner had applied for and received the United States passport introduced into evidence and had used it to enter the United States on December 20, 1938, as an American citizen named Samuel Levine (T3, p. 6). Because he was not examined as an alien upon entry as required, petitioner was ordered deported (T3, p. 8).

The Board of Immigration Appeals agreed with the Special Inquiry Officer's findings of fact, holding that the government had borne its "burden of establishing that respondent is deportable as charged" (T1, pp. 2-5).

On petition for review of the order of deportation, a panel of the court of appeals, Judge Friendly dissenting, set aside the deportation order and remanded the case for further proceedings, holding that "the Government must prove beyond a reasonable doubt the facts upon which deportation depends" in cases involving long-time resident aliens. Pet. App. 20; 350 F. 2d at 899. On petition for rehearing, the

The Board also noted that (T1, p. 6):

"[I]t is established beyond any reasonable doubt that respondent himself applied for the passport giving his true description, attaching his photo to it; and stating that he was going abroad. Under such circumstances, in the absence of evidence to the contrary, proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it."

court *en banc* sustained the deportation order for the reasons stated in Judge Friendly's prior dissenting opinion. Pet. App. 24-25; 350 F. 2d at 901.

ARGUMENT

The decision below correctly holds that the standard of proof applicable to deportation orders is that established by Section 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1252(b). By that provision, Congress directed the Attorney General to make regulations requiring that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." Previously, a lower quantum of proof—i.e., "some evidence"—had been held sufficient. See *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106; see generally, Gordon & Rosenfield, *Immigration Law and Procedure* § 8.12c (1965). Both houses of Congress specifically explained what was meant by "reasonable, substantial, and probative evidence" (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 30; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 57).

The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below.

In 1961, when Congress established the present system of review of deportation orders in the courts of appeals, it specifically reaffirmed the substantial evidence standard as applicable to the new review procedures (Section 106(a)(4) of the Act, 8 U.S.C. 1105a(a)(4)):

[T]he petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.

In the light of this history, petitioner's contention that these statutory provisions do not define the standard of proof (Pet. 8) is without merit. The government has the burden to establish deportability by "evidence that has relevant probative force and which a reasonable mind might accept as adequate to support a conclusion." *Lattig v. Pilliod*, 289 F. 2d 478, 479 (C.A. 7). The Special Inquiry Officer properly placed this burden on the government in the instant case (T3, p. 2),^{*} and the facts set forth in the Statement, *supra*, show that the government

^{*} Since petitioner refused to identify his original 1920 record of entry (Tr. 7-8), the government was in a position to rely on Section 291 of the Immigration and Nationality Act (8 U.S.C. 1361) which creates a presumption that an alien is in the United States contrary to law unless he proves the time, place and manner of entry. While the present administrative record does not contain proof of petitioner's lawful entry in 1920, we concede that such lawful entry was made. Therefore, the burden of proving entry without inspection in 1988 was properly on the government.

made out a strong and persuasive case (see T3, p. 6). There is no sound basis, in the light of the statute and its history, for petitioner's suggestion that the standard should be either "clear, unequivocal and convincing" proof or proof "beyond a reasonable doubt" (Pet. 7). The dissenters in the court below proposed what they recognized as largely a semantic change from the statutory standard in order to cause the Board "to proceed carefully" in cases such as this (Pet. App. 21). But there is no reason to believe that the Board did not proceed carefully here or that the statutory standard is not sufficient to insure careful consideration at the initial proceedings as well as on appellate review.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, Jr.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

APRIL 1966.

* It should be noted that Congress has provided relief from deportation for resident aliens who meet certain conditions. Sections 244 and 249 of the Immigration and Nationality Act, 8 U.S.C. 1254, 1259. Petitioner has not applied for such relief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [REDACTED]**40**

ELIZABETH ROSALIA WOODBY,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 825

ELIZABETH ROSALIA WOODBY,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is found on Pages 127-133 of the record. This opinion has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1965 (R. 126). The Petition for Certiorari was filed on December 15, 1965 and granted on April 18, 1966 (R. 133; 86 S. Ct. (1966) 1336). The jurisdiction of this Court is conferred by 28 U. S. C. Section 1254.

QUESTION PRESENTED

I. Were the decisions of the Board of Immigration Appeals and also of the special inquiry officer supported by "reasonable, substantial and probative evidence on the record considered as a whole"; and parenthetically what does "reasonable, substantial and probative" mean?

II. Did the United States Court of Appeals for the Sixth Circuit commit error by not returning the case to the Immigration Service to adduce additional evidence as provided in 5 U.S.C. 1037-c?

STATUTES INVOLVED

Section 242 (b) of the Immigration and Nationality Act, 8 U.S. Code Section 1252 (b), provides in part:

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

Section 106 (a) (4) of the Immigration and Nationality Act, as amended, 8 U.S. Code Section 1105 (a) (4), provides in part:

"... the petition (for review of a deportation order) shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

5 U.S.C. 1037 (C) provides:

If a party to a proceeding to review shall apply to the Court of Appeals, in which the proceeding is pending, for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency, such

court may order such additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its order and shall file a certified transcript of such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order.

STATEMENT OF FACTS

The Petitioner is a 34 year old female, who married an American soldier in Germany while he was stationed there. She gave birth to one child in Germany, and remained there for more than a year after her husband returned to the United States. She arrived in the United States in February of 1956, and she, her husband and their daughter lived with her husband's parents in Harlan, Kentucky. A few months later they moved to Dayton, Ohio, where her son was born prematurely on August 13, 1956 (R. 55). At that time the Petitioner, her husband and daughter lived at 528 Notre Dame, Dayton, Ohio, and lived at that address for approximately four months after the birth of the child (R. 56), this would have been approximately January 1, 1957. At that time the Petitioner's husband virtually forced her to go to Pennsylvania to visit a friend. She returned the next day to find that her husband had taken the children and had moved to Kentucky. She had no funds to follow him and later employed counsel to get the children back. The Petitioner went to work at McCrory's 5 & 10¢ store, and worked there approximately three months (R. 59). This would place the time at approximately April 1, 1957. The Petitioner then went to work at Neil's Restaurant, and at the same time had moved her residence to Summit Court (R. 59). The Petitioner received a telephone call from her husband, who was in

Kentucky, stating that he needed \$300 at once for an operation for the baby. The baby was supposed to be in the hospital and the husband did not have any insurance or Blue Cross to pay the hospital, and they were not going to perform the operation unless they were paid the \$300 in advance (R. 59), and she was led to believe and did believe that the child would die if the operation were not performed.

The next day a vacuum cleaner salesman, by the name of Tom Walley, came to the door to sell the Petitioner a vacuum cleaner, and she told him the story. He told her that he could help her get the money, since she knew no one else from whom she could borrow the money. He left the apartment and returned with a bottle of whiskey and another man. He took some pictures of her, and it appears that men started coming to the apartment the next day (R. 48). These arrangements continued for approximately two months, until the Petitioner had repaid the \$300 which she needed for the operation for her son (R. 62). When the Petitioner attempted to cease the arrangement which she had, she was threatened by Walley with being reported to the immigration authorities and the police (R. 45). Even facing these threats of blackmail, the Petitioner terminated this relationship with Mr. Walley, and moved to Knoxville, Tennessee to get away from Walley and remained there until July 4, 1957 (R. 63 and 68). A Mrs. Jackson, a friend of petitioner, drove to Knoxville, to pick up the Petitioner and brought her back to Dayton, Ohio, where the Petitioner lived with Mrs. Jackson on Rugby Road. They lived there from July 4th, 1957 until some time in September, 1957, when they moved to 1500 W. Riverview, above Neil's Restaurant, where the Petitioner was working (R. 68). Mr. Amicon met the Petitioner at Neil's restaurant in October, 1957 where she was working (R. 50). Mr. Amicon was introduced at the restaurant to the Petitioner as an alleged prostitute, but

he found that she was not, and that she had ceased all such actions after she had repaid the money which was needed for her son's operation. Amicon testified that he was willing to marry the Petitioner (R. 51). (The Petitioner has been a widow since July 14, 1957, when her husband was killed in an automobile accident.)

ARGUMENT

- I. WERE THE DECISIONS OF THE BOARD OF IMMIGRATION APPEALS AND ALSO OF THE SPECIAL INQUIRY OFFICER SUPPORTED BY "REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE"; AND PARENTHETICALLY WHAT DOES "REASONABLE, SUBSTANTIAL AND PROBATIVE" MEAN? MUST THE GOVERNMENT PROVE THE FACTS ON WHICH THE DEPORTABILITY OF THE ALIEN DEPENDS, BY A MERE PREPONDERANCE OF THE EVIDENCE, OR DOES IT HAVE A GREATER BURDEN?**

In order to have a proper perspective of this case, it is necessary to divide the periods of time into two separate parts. The first period of time commences approximately April 1, 1957 when the Petitioner admitted she began engaging in acts of prostitution. The first period of time ceases approximately June 1, 1957 when the Petitioner alleges that she terminated her acts of prostitution and left for Knoxville, Tennessee (R. 63).

The second period of time, which we are concerned with, commences at the end of the first period or approximately June 1, 1957, when the Petitioner stated that she ceased engaging in acts of prostitution and continues until some time in 1958 when the Special Inquiry Officer and the Board of Immigration Appeals found that the Petitioner had actually ceased engaging in acts of prostitution.

For the period April 1, 1957 to June 1, 1957, there is no question that the Petitioner did engage in acts of prostitu-

tion, for she admitted this. Her defense to these acts of prostitution, was that she was acting under duress.

There appears to be no purpose in discussing the law which relates to the fact that the Petitioner's acts of prostitution that were committed during this period of time, are legally excusable because of duress. The basis of the special inquiry's officer's decision (R. 78), was that he found that after the duress has terminated, the Petitioner continued to engage in acts of prostitution. This decision is substantiated by the decision of the Board of Immigration Appeals (R. 112) where this Board again found that the Petitioner engaged in prostitution after duress had ended. There was no finding that the Petitioner was not acting under duress and so therefore, this Brief is being restricted to the facts and law that relates to the facts that occurred after July 4, 1957, when the Petitioner returned from Knoxville, Tennessee (For our Brief on the law of duress, see R. 85-96).

The question that is raised is, during the second period of time which commences approximately June 1, 1957, what evidence was there to support the findings of the Special Inquiry Officer, and the Board of Immigration Appeals.

The Board of Immigration Appeals stated,

"Even if the Respondent's story is to be believed, and even if it is to be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress, nevertheless the continuance of the practice of prostitution until at least late in 1957 is not explained and cannot be defended on the ground of duress."

Was this finding "Supported by reasonable, substantial, and probative evidence on the record considered as a whole . . .," 8 U.S.C. Section 1105 (a) (4)?

And, if so, what standard did the Special Inquiry Officer and also the Board of Immigration of Appeals use when they found that Mrs. Woodby was deportable for her acts which were alleged to have been committed after June 1, 1957, which is the period of time to which she does not admit having engaged in acts of prostitution. In order to determine the basis of the decision of the Special Inquiry Officer and also of the Board of Immigration Appeals it is necessary to look at all of the testimony which was introduced before the Special Inquiry Officer which would be adverse to the Petitioner in this Case. The only person who ever testified as to the Petitioner having engaged in prostitution, was the Petitioner herself. The determination of fact, as made by the Special Inquiry Officer, that the Petitioner engaged in prostitution after June 1, 1957, was based upon certain dates which had been given by the Petitioner, by Mr. Amicon, and by other witnesses at the Hearing.

The Special Inquiry Officer made findings of fact which were not supported by the record, in this case. In his decision, it is stated that Mr. Amicon stated that he met the Petitioner in October of 1957 (R. 77). As a result of this meeting, the Special Inquiry Officer erroneously found that the Petitioner had been practicing prostitution from April, 1957, until September, 1957, or for approximately six months, because Mr. Amicon was told by his dinner companion that the Petitioner was "in the business" at the time of his introduction to her. This statement at best can be considered as hearsay. In the record of the proceeding it is stated that the Petitioner went to Knoxville, Tennessee for several months, and remained there until July 4, 1957; that she lived with a Mrs. Jackson, first on Rugby Road and then moved to above Neil's Restaurant in September of 1957. The Petitioner met Mr. Amicon about one month later, as aforesaid. She stated in the record

that she ceased practicing prostitution prior to her leaving for Knoxville, Tennessee. The entire time sequence is erroneously stated in the decision.

The Special Inquiry Officer found that Mrs. Woodby moved to Summit Court in February of 1957, and resided there to February, 1958 (R. 78). This finding is again contrary to the evidence because Mrs. Woodby lived for a period of time in Knoxville, Tennessee, from where she returned from July 4, 1957 (R. 63 and 68), and she moved to 1500 West Riverview (R. 68), approximately one month before she met Mr. Amicon in October of 1957 (R. 50). Mrs. Woodby resided at 1500 West Riverview until approximately January 1, 1958 (R. 68). If Mrs. Woodby resided with Mrs. Jackson at 1500 West Riverview from September, 1957, until January, 1958, it would be impossible for her to be living on Summit Court as found by the Special Inquiry Officer (R. 78). There is no question that there is some confusion about the exact time the witnesses lived at a certain location, but as shown above, these dates are mutually corroborated by the witnesses. As a result of these minor discrepancies in dates however, the Special Inquiry Officer so construed these dates that he felt that there was sufficient reason to deport the Petitioner. This is one of the reasons that in a case as grave as this that this Court must determine what standard will be used for weighing the evidence.

The decision of the Board of Immigration Appeals again contains partially the same confusion of dates as those contained in the finding of the Special Inquiry Officer. In their finding it was stated that it was not clear from the testimony, whether the Petitioner terminated her acts of prostitution in 1957 or 1958. It is clear, under the facts, that the Petitioner terminated her acts of prostitution in approximately June of 1957 and, therefore, the finding that she committed acts of prostitution after that date is

clearly erroneous. The correct time sequence is as follows:

(1) The Petitioner began the practice of prostitution approximately April 1, 1957 and engaged therein for approximately two months (R. 59).

(2) The Petitioner traveled to Knoxville and returned therefrom on July 4, 1957 (R. 63 and 68).

(3) The Petitioner lived with Mrs. Jackson, first on Rugby Road and then at 1500 W. Riverview, above Neil's Restaurant from July 4, 1957, until October of 1957 when she met Mr. Amicon (R. 50 and 68).

The Special Inquiry Officer and the Board of Immigration Appeals erroneously found that the Petitioner had engaged in prostitution after June 1, 1957. The Hearing took place in November of 1961, and in March of 1962, while the acts of prostitution took place in 1957, approximately four years earlier. There is no question that there were discrepancies in the dates that were given, but this is certainly not a sufficient reason to deport the Petitioner.

It is up to the Court to determine if the decision of the Special Inquiry Officer was supported by "reasonable, substantial, and probative evidence" (8 U.S.C. 1105 (a) (4)). The statute creates this judicial standard for review, but leaves open the degree of proof that must be introduced before the Special Inquiry Officer, for the Immigration and Naturalization Service to sustain its required degree of persuasion. This required degree of persuasion pursuant to the statute may not be reasonable *or* substantial *or* probative, but rather all three criteria must be present.

This Court in *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) held that "substantial" evidence in finding a "meaningful association" with the Communist party was more than by a preponderance of the evidence. The evidence in that case showed that the Petitioner was a dues-paying member of the Party from 1949 to 1951, that he attended at least 15 Party meetings, that he was an official,

and that he attended a Party convention. The Petitioner did not deny any of these facts, and this Court found that the deportation Order was not supported by substantial evidence. This testimony alone should have been sufficient to sustain the burden required of the Government if it were only by a preponderance of the evidence, but it was not. This Court required a greater quantum of proof when it said that the deportation order was not supported by substantial evidence. It is not clear the degree of proof that the Court was seeking, but whatever it was, the Government did not meet it.

As in civil cases, it is up to the Court to determine what degree of persuasion would be required of the proponent in a particular case, which degree of persuasion would depend upon the particular type of case (Wigmore, Evidence Sec. 2497 (3rd Ed. 1940)). The type of proof and the degree of proof required has always been established by the judiciary (McBaine, Burden of Proof; Degrees of Proof 32 Cal. L. Rev. 242 (1944)). The degree of proof required should be determined by the severity of the ultimate result of the decision. In the case at bar, the ultimate result is deportation of an alien who was legally admitted to the United States; she has two minor children who reside in the United States; and if deported, she will be deported to Germany, and if not accepted by Germany, then to Hungary, a Communist country. For a woman who has lived in this country for ten years, this is indeed a harsh result.

In *Sherman v. Immigration and Naturalization Service*, 350 F. 2d 894 (1965) Judge Waterman, while discussing the burden of persuasion required, stated that in some cases courts have required one party to carry the burden usually borne by the prosecution in criminal cases, such as where it was necessary to prove nonaccess beyond a reasonable doubt in overcoming the presumption of legitimacy.

He then concluded by saying "the Government is required to establish that it is *almost certainly true* that Petitioner entered the United States without inspection in 1938; in other words, the Government must prove beyond a reasonable doubt the facts upon which deportation depends."

In *Rowoldt v. Perfetto*, 355 U.S. 115 at 120 (1957) this Court stated that "solidity of proof" is required for a judgment entailing the consequences of deportation. Again the judgment by a preponderance of the evidence was denied and this higher standard was used.

Gastelum, Sherman, and Rowoldt, are just three cases where the Courts have required a higher standard than proof by a preponderance of the evidence in deportation cases.

In a denaturalization proceeding, the evidence must be "clear, unequivocal, and convincing." Is a deportation proceeding so different that the degree of proof required should be any less? If the Petitioner would have been sought to be deported because of having been convicted of the criminal act of having engaged in acts of prostitution, the standards would be quite different than those used here. She would have been afforded a trial, either by a Court or by a jury, at her choice, and the degree of persuasion upon the State to prove her guilt would have been "beyond a reasonable doubt."

If found guilty of such a charge then the Petitioner would have been deportable (8 U.S.C. 1251). *In this case the Petitioner was never criminally charged, tried, or convicted of having engaged in prostitution. Because the Petitioner was never charged or tried criminally, should she be subject to deportation by the application of a civil degree of persuasion that is less than the degree of persuasion required in a criminal case?*

The degree of persuasion in this case should have been either "beyond a reasonable doubt" as required in criminal

cases or at least by "clear, unequivocal, and convincing" evidence.

On the other hand, if the statute requiring the finding of the Special Inquiry Officer to be supported by "reasonable, substantial and probative evidence" is thought to set the degree of persuasion for the Special Inquiry Officer, then this language is not so inflexible to prevent this same finding.

Substantial evidence may arguably be considered evidence that is "clear and convincing," or "beyond a reasonable doubt."

If the evidence is found by the Special Inquiry Officer to be "clear and convincing," then his finding may be considered supported by "substantial" evidence. The underlying determination as to the substantiality of the evidence must therefore be made by the Special Inquiry Officer. His determination, however, must be reasonable when considering all of the evidence. One writer in this field stated "... the enforcement of a right of considerable importance to the proponent cannot be made subject to a power of completely free evaluation of the evidence" (Lewis L. Jaffee, *Judicial Control of the Administrative Action* (1965) at Page 608).

Deportation is certainly one of the greatest penalties an alien can suffer. Mr. Justice Brandeis, when discussing the gravity of deportation, once stated: "It may result also in loss of both property and life; or of all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. at 276 (1922)).

Using either theory of approach that:

1. The standard of "reasonable, substantial and probative" is only the standard for the reviewing Court to apply to determine if the Special Inquiry Officer applied the correct standard in the particular case as established by this Court, or

2. That "reasonable, substantial and probative" in the deportation case means "clear, unequivocal, and convincing," or "beyond a reasonable doubt" because the evidence must be such in a deportation case such as this, in order to be "substantial" or "reasonable."

The same conclusion can be arrived at when examining the evidence in this case using either theory. Either theory would require the Court to establish the required and necessary standard for the degree of persuasion required to be presented in this particular type of case. Since the main concern is the protection of the rights of the alien who may be subject to deportation, it is incumbent upon the Courts to protect these rights by establishing certain standards that must be used in the hearing process.

Mrs. Woodby engaged in prostitution from approximately April 1, 1957 to approximately June 1, 1957. She admitted having engaged in these acts of prostitution during this period of time, but her defense to having engaged in such acts was duress. Neither the Special Inquiry Officer nor the Board of Immigration Appeals found that Mrs. Woodby was not acting under duress during this period of time and therefore for the sake of argument assumed that her defense was proper. The sole basis for the deportation order was that they found that Mrs. Woodby, in fact, engaged in acts of prostitution after June 1, 1957. The Special Inquiry Officer found that Mrs. Woodby engaged in prostitution until October, 1957, when she met Mr. Amicon. The finding that Mrs. Woodby engaged in prostitution until October, 1957, was based upon the statement by Mr. Amicon that he was told by a dinner companion that she was "in the business." Mr. Amicon testified that Mrs. Woodby did not engage in acts of prostitution after he met her, and that as far as prior to that time, he did not know. Mrs. Woodby testified that she had ceased her such acts prior to leaving for Knoxville, Tennessee, which would have been in early June of 1957.

The Special Inquiry Officer became confused as to certain dates. This is not unusual because the Hearing took place approximately four (4) years after the events that the parties were questioned about. The question that is presented before this Court, however, is because of some confusion in dates in the record, is this sufficient to find that the Petitioner should be deported?

The evidence of a party having the burden of proof may not be disbelieved without an explicit and objectively adequate reason. See *Mar Gong v. McGranery*, 109 F. Supp. 821 (S.D. Cal. 1952). In that case the testimony was rejected ostensibly because of discrepancies on minor matters; but the opinion of the trial Judge revealed that his rejection was based on a general—and in a statistical or administrative sense quite legitimate—suspicion of such claims and inherent difficulties of uncovering fraud. The Courts have held as a matter of law that the evidence of one having the burden of proof must be accepted even though it may not be believed by the trier of the fact or at least it has not convinced him. See *Carmichael v. Wong Choon Ock*, 119 F. 2d 173 (9th Cir. 1941); *Gung You v. Nagle*, 34 F. 2d 848 (9th Cir. 1929).

If the proponent has presented the best available evidence which is logically adequate, and is neither contradicted nor improbable, it must be credited, particularly in a case where the opponent is not an individual who stands to suffer from an adverse finding. In the case of *United States ex rel. Exarchou v. Murff*, 265 F. 2d 504 (2d Cir. 1959), a Petitioner's right to a discretionary suspension of deportation depended on his "good moral char-

acter," and the Court was prepared to accept his testimony as to motivation at its face value.

The Court of Appeals stated "there was much confusion as to the places at which and the times during which she (Petitioner) carried on as a prostitute" (R. 131). They then stated, "We believe our function ends when we find, as we do, that the Board's underlying order is "supported by reasonable, substantial, and probative evidence on the record considered as a whole . . ." (R. 132). In conclusion the Court stated, "We are not at liberty here to proceed on the basis of what we might have done had we been in the position of the immigration authorities" (R. 132). The Court of Appeals did have this duty to review the evidence presented to determine if the Immigration and Naturalization Service met its burden to prove the Petitioner's deportability. This is not one of those cases where one must be specialized or an expert to evaluate the evidence presented, and therefore the courts must respect their decisions (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951)). This is a case where the reviewing court can weigh the evidence to determine the correctness of the agency's determination.

The evidence that was presented was not sufficient to even meet the normal civil burden test of "by a preponderance of the evidence," let alone meet the tests of "clear and convincing" or "beyond a reasonable doubt."

On the surface it would appear that the testimony given to the original investigating officer could give rise to a basis for a finding of fact that Petitioner did engage in prostitution between June 1, 1957 and October 1, 1957. A more complete examination however reveals that the

statements made in such initial investigation must be (and by the Government have been) repudiated in full for the following reasons:

(1) At the Hearing to show cause, Petitioner repudiated her prior statement as being untrue.

(2) At the Hearing to show cause, all facts touched upon in the earlier statements were reexamined to the fullest extent desired by the Government and counsel for Petitioner, obviating any need for reference to the impeached statements.

(3) Admission of the prior statement with the Petitioner and witness available to testify and testifying as to all facts contained in the prior statements rendered the use of these statement inadmissible in the proceeding.

(4) While the statements could be used to impeach the Petitioner and Mr. Amicon who were the sole Government witnesses, they cannot be used to provide positive proof of facts.

(5) The introduction of these statements was objected to for the reason that counsel did not have the opportunity to examine the statements prior to their introduction or to cross-examine the witnesses at the time of the taking of the statements, and they were therefore improperly admitted.

Possibly the best summation of this factual fiasco is to plagiarize from an expert who stated:

"At this point it is appropriate to warn against our tendency almost unwittingly to take the 'principles' of administrative law as dogma. Limited Judicial review is not an absolute value; it is a resolution of conflicting considerations, a resolution which is valid for most cases. But it would be difficult to deny that independent re-evaluation by a reviewing body gives a defeated party an additional protection."

(Jaffee, Judicial Control of Administrative Action; Page 647 (1965)).

II. DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMIT ERROR BY NOT RETURNING THIS CASE TO THE UNITED STATES DEPARTMENT OF JUSTICE, DIVISION OF IMMIGRATION SERVICE TO ADDUCE ADDITIONAL EVIDENCE AS REQUESTED IN THE PRAYER FOR RELIEF IN THE BRIEF FILED BY THE PETITIONER IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THIS CAUSE.

There were many discrepancies in the times, dates and places in this case which were understandable for the reason that the acts of prostitution took place early in 1957 and yet the hearing before the Special Inquiry Officer was held on March 28, 1962, approximately 5 years later. Because of the time span, much confusion was caused by pinpointing exact times and places and yet this entire case has resolved itself around the exact time that these acts of prostitution took place. The confusion of times and places and the lack of facts is substantiated in the decision of the Court of Appeals when they stated, "Even if it were our function to appraise the harshness of the deportation of this petition, we do not have sufficient facts before us upon which to form our own judgment thereon."

Title 5, U.S.C. 1037 (c) *provides that a Court of Appeals may order additional evidence taken in a case such as this, and that a Certified Transcript of such additional evidence and modified or new findings shall be filed with the Court of Appeals. In the case at bar the Court of Appeals did not even act on this request by the Petitioner even though the facts as alleged by the Petitioner did constitute a complete defense to a deportation order. Since the only evidence contained in the record which was used to find the Petitioner deportable, was the testimony of the Petitioner alone, we take the position that it was incumbent upon the*

Court of Appeals to order additional evidence taken to clear up the discrepancies in times, dates, places and facts as contained in the record in this case.

There is neither a showing in the record or any other place that the respondent had ever practiced prostitution prior to the 2 month period during which she concedes practicing prostitution, nor, is there any showing that she had committed any acts of prostitution subsequent to this 2 month period.

The relief prayed for in the Court of Appeals was, to reverse the findings of the Board of Immigration Appeals and the finding of the Special Inquiry Officer and terminate the deportation proceedings pending against the Petitioner, or in the alternative to remand the case to the Department of Justice for the taking of further evidence.

The Court of Appeals refused to reverse and in fact sustained the findings of the Board of Immigration Appeals and the finding of the Special Inquiry Officer. *However, it never acted, neither affirmatively nor negatively upon the request that the case be remanded to the Department of Justice for the taking of further evidence as it had the duty to do under Title 5, U.S.C. 1037 (C).*

CONCLUSION

The first tragic experience in the Petitioner's life is reflected when she was raped by a Russian or an Hungarian when she was about 15 years old in 1946 (R. 14). She worked for a year and a half after that in Germany to support her mother who was in a hospital, until she died (R. 15 and 16). She later married an American serviceman in Germany, who left her there for a year and a half after he returned to the United States (R. 54). She then came to the United States in 1957, and after living in Harlan, Kentucky, with her in-laws for about six months,

during which time her husband never worked (R. 55), the Petitioner and her husband moved to Dayton, Ohio. Petitioner delivered a second child in Dayton, Ohio (R. 56), and about four months later her husband put her on a bus to Pennsylvania (R. 57) and when she returned her husband and children were gone. Subsequently, her husband called and told her that he needed \$300 for an operation for the baby (R. 60). She said she did not have the money and he told her "If you are mother enough, you know how to get it, if you care enough for the child" (R. 61).

The rest of the tragic story has been set forth in this Brief and in the record, and she did send the \$300 to her husband for the child. The Immigration and Naturalization Services claimed at first that this was not duress. They then found that the Petitioner engaged in prostitution after the duress had ended. They based this finding upon the confusion as to dates and places in the record. This was a confusion that existed four years after the fact. If each witness testified as to exact dates and places, they would have argued that the witnesses had been coached, because people just do not remember such minutia.

Can we say that because this confusion exists, that there is "reasonable, substantial and probative evidence" with which to deport the Petitioner? Must this be the conclusion of her tragic life? Is this evidence sufficient to tear this mother away from her two minor children, age 10 and 12, probably never to see them again?

To believe or to disbelieve must not be the test to support a deportation order. It must be much more in order to create such a tragic end to a life that could be worth living. Whether the test be one of "solidity of proof" or "clear and convincing" or "beyond a reasonable doubt," the Immigration and Naturalization Service has not met its proper burden of persuasion.

It is respectfully submitted that this Court reverse the lower Court decisions finding that the Petitioner is subject to deportation.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 40

ELIZABETH ROSALIA WOODBY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 127) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1965. The petition for a writ of certiorari was filed on December 15, 1965, and was granted on April 18, 1966 (R. 127-133; 384 U.S. 904). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Attorney General found the factual grounds for deportation with the requisite degree of persuasion.

(1)

2. Whether the court of appeals erred in holding that the deportation order was supported by reasonable, substantial and probative evidence on the record considered as a whole.

3. Whether the court of appeals erred in declining to remand the case to the Immigration Service as authorized by 5 U.S.C. 1037(c).¹

STATUTES INVOLVED

Section 241(a)(12) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(12), requires the deportation of any alien who:

“by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a); * * *.”

Section 212(a)(12) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(12), bars the entry into the United States of:

“Aliens who are prostitutes or who have engaged in prostitution * * *.”

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b), prescribes the procedure in deportation cases, directs that “no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence” and declares that “The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.”

Section 106(a)(4) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(4), deals

¹ 5 U.S.C. 1037(c) has been recodified as 28 U.S.C. App. 2347(c) by Act of September 6, 1966, P.L. 89-554, 80 Stat. 378, 623.

with the judicial review of deportation orders, and provides (with exceptions not relevant here) that the petition for review "shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

STATEMENT

Petitioner is an alien, a native of Hungary and a citizen of Germany. She entered the United States on February 7, 1956, and is now 34 years old (R. 37, 74). While in Germany she married John Henry Woodby, an American citizen, on January 8, 1955. A daughter was born to them in Germany on April 7, 1955. After coming to the United States she lived with her husband briefly, and a son was born to them on August 13, 1956. Petitioner and her husband separated in December 1956, and never again lived together (R. 10-11, 55-58, 77). Her husband died on July 14, 1958 (R. 10), and she has not remarried. Her two children have been with their paternal grandparents for several years, pursuant to a court order awarding custody to them (R. 11, 65-66).²

1. In 1961 petitioner appeared voluntarily and with counsel before immigration officers who interrogated

² Petitioner testified that temporary custody of the children had been awarded by the court to the grandparents and that she had instituted court proceedings to regain custody (R. 65-66). Investigations of the Immigration and Naturalization Service, not shown in the record, indicate that petitioner's attempts to regain custody of the children were unsuccessful and that (as of September 12, 1966) the children were still in the legal custody of the grandparents, pursuant to court order.

her (R. 9-31). As the result of petitioner's admission to the immigration officers that she had been engaged in prostitution (R. 22-23), deportation proceedings were commenced against petitioner by order dated January 9, 1962 (R. 32-34). A hearing was held on March 28, 1962, before a special inquiry officer at which petitioner and three witnesses were examined by counsel for petitioner and for the Immigration Service (R. 35-73). Petitioner admitted that she had engaged in prostitution for a period of several months in 1957. She contended, however, that the acts of prostitution were committed under duress. Although petitioner gave several contradictory accounts of the nature and duration of her involvement in prostitution, the gist of her story was as follows:

Petitioner's second child was born prematurely on August 13, 1956 and was kept in the hospital for some time thereafter (R. 55-57). Shortly after the infant was brought to their home at 528 Notre Dame Street, Dayton, Ohio, in about December 1956, petitioner and her husband quarreled, and petitioner went to visit a friend in Pennsylvania (R. 57, 65). She stayed only one day and upon her return found that her husband had taken the infant to his parents' home near Harlan, Kentucky, where the older child was already staying (R. 58). Petitioner then got a job at McCrory's, a five and dime store in Dayton, which she kept for about three months (R. 59). She subsequently moved to a new apartment at Summit Court and became a waitress at Neil's Restaurant (R. 59). While living at Summit Court, she received a telephone call from her husband who told her that the baby was very sick and required a serious operation, that \$300 was needed

for hospital expenses, and that he expected her to raise the money (R. 44, 59-61). The following day a vacuum cleaner salesman named Tom Wally called at her home. When she told him of her financial plight, he suggested that she could earn the money she needed as a prostitute; Wally offered to lend her the needed \$300 and to serve as her procurer if she would agree (R. 44-45, 61-62). She accepted this proposition and immediately began to work as a prostitute on a part-time basis, since she was also working as a waitress. Her involvement in prostitution continued until she had accumulated the \$300 necessary to repay Wally (R. 62). She then told Wally she was quitting, and he threatened to expose her to the authorities; she continued for another two weeks or so and then terminated her involvement with Wally (R. 45-46). Although petitioner testified that her relationship with Wally halted after about two months (R. 47), petitioner's testimony does not expressly identify the time at which she abandoned prostitution. However, both in her statement of November 20, 1961 (R. 24, 25) and in her testimony on March 28, 1962 (R. 46), she linked the abandonment to her meeting with Anthony Amicon, which occurred not earlier than October 1957 (R. 50, 121). Petitioner also testified that, either in 1957 or 1958 (R. 64), she spent three months working as a waitress at the Brown Derby in Knoxville, Tennessee, and that during that period she did not engage in prostitution (R. 63). In her statement of November 20, 1961, she said that the stay in Knoxville was occasioned by her eviction from her Summit Court apartment as a consequence of the

landlord's discovery that another of Wally's girls was using her apartment for prostitution (R. 30-31). The three month stay in Knoxville ended on a fourth of July when petitioner asked her friend Arlene Jackson to drive her back to Dayton (R. 63).

Anthony Amicon was called as a witness by the government (R. 49). He testified that he had met petitioner around October 1957 (R. 50) (he had previously fixed the date as December 1, 1957 (R. 4)). That meeting took place at Neil's Restaurant where she was employed and where he went to eat with a friend who told him that petitioner was "in the business" of prostitution (R. 3, 50). That same evening, at petitioner's invitation, he called at her apartment at 1500 West Riverview in Dayton (R. 3, 50). Although he gave her \$10 they did not have sexual intercourse on that occasion, because "when it actually came down to the thing I couldn't go through with it. When I left I left the money anyway" (R. 3, 51). However, they commenced having sexual relations about two or three months later, after which "sex turned into love" (R. 4, 53). Amicon was then married, but was separated from his wife (R. 2, 52). He also testified that he was arrested by police in petitioner's apartment on February 27, 1959, and at that time signed a statement that he was then paying petitioner for acts of prostitution. However, he denied that his statement was true, alleging that he had signed it in order to help petitioner (R. 5).

Arlene Jackson was called as a witness for petitioner (R. 67). She testified that she had lived with petitioner for a period of about two and a half years

prior to February 1961 (R. 68). That period began on a July 4—presumably in 1958—when Mrs. Jackson drove to Knoxville, Tennessee, and brought petitioner back to Dayton, where they eventually settled at 1500 West Riverview (R. 68). Mrs. Jackson testified that petitioner had a good reputation and did not entertain any men during the time they lived together (R. 69).

Juanita Lewis was called as a witness for petitioner (R. 70). She testified that petitioner had a good reputation and was a good housekeeper. She also testified that she had frequently visited with petitioner while petitioner was living with Mrs. Jackson and had never seen men in her house (R. 71).

2. Following the hearing, the special inquiry officer, in an opinion dated October 30, 1962, found petitioner deportable (R. 74-79). He characterized petitioner's testimony as "a hard story to believe". However, he concluded that, even if her story of financial need occasioned by the illness of her child were sufficient to constitute duress, "a careful study of the record discredits that story" (R. 77), because the evidence demonstrated that she had continued to practice prostitution long after the alleged financial need had ended. Petitioner's appeal to the Board of Immigration Appeals was dismissed on March 8, 1963 (R. 108, 112). The Board found that even if petitioner's "bizarre story" were accepted, "it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958, long after she had repaid the loan to the vacuum cleaner salesman" (R. 112). Petitioner sought reconsideration by motion filed May 17, 1963 (R. 115, 118-121), which was

denied by the Board on May 27, 1963 (R. 123-125). On petition for review, the court of appeals affirmed (R. 127-133). The court held that the deportation order was supported by reasonable, substantial, and probative evidence on the record considered as a whole and that the denial of the motion to reconsider was not an abuse of discretion (R. 132).³

ARGUMENT

INTRODUCTION AND SUMMARY

Under Section 212(a)(12) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(12)), an alien who engages in prostitution is deportable. That provision, which is to be distinguished from those which provide for the deportation of aliens convicted of crimes (Section 212(a)(9) and (10), 8 U.S.C. 1182(a)(9) and (10)), has been a feature of our immigration law for a great many years. See Act of February 20, 1907, Section 3, 34 Stat 898, 899; Act of February 5, 1917, Section 19, 39 Stat. 874, 889; cf. Act of March 3, 1875, 18 Stat 477; *Bugajewitz v. Adams*, 228 U.S. 585; *Costanzo v. Tillinghast*, 287 U.S. 341. The constitu-

³ Finding that the Board's order must be affirmed, the court of appeals declined to consider the Immigration Service's contention below that, since the petition for review had been filed more than six months after the deportation order but within six months after the denial of the motion for reconsideration, judicial review was limited, under Section 106(a)(1) of the Act (8 U.S.C. 1105a(a)(1)), to the question whether the latter order entailed an abuse of discretion. Cf. *Giova v. Rosenberg*, 379 U.S. 18. Following the decision below, the Ninth Circuit has held, in similar circumstances, that it had jurisdiction to review the deportation order as well as a denial of a motion to reopen. *Bregman v. Immigration & Naturalization Service*, 351 F. 2d 401 (C.A. 9). In light of that decision, we abandon our contention below. Compare *Lopez v. Immigration & Naturalization Service*, 356 F. 2d 986 (C.A. 3), certiorari denied, October 10, 1966 (No. 380, this Term).

tional power of Congress to provide for deportation under such circumstances is not challenged in this case. Nor is it disputed that petitioner is in fact an alien who engaged in prostitution. Petitioner's principal contention is directed at the finding of the special inquiry officer and the Board of Immigration Appeals that her defense of duress was inadequate to account for her activities as a prostitute because it appeared from the evidence that those activities continued after the alleged duress had terminated. In particular, petitioner contends that (1) the inquiry officer and the Board did not reach the finding with the requisite degree of persuasion; and (2) the court of appeals erred in holding that that finding was "supported by reasonable, substantial, and probative evidence on the record considered as a whole," as required by Section 106(a)(4) of the Act (8 U.S.C. 1105a(a)(4)).

Both the degree of persuasion required of the factfinder and the scope of review appropriate to the court of appeals are discussed at length in our brief in *Sherman v. Immigration and Naturalization Service*, No. 80, this Term; we incorporate that discussion by reference rather than repeat it here. We urge in *Sherman* that, while the trier of the facts must be affirmatively persuaded by substantial evidence that deportability is established, neither the "beyond a reasonable doubt" standard nor the "clear and convincing proof" standard is applicable. Here we show that the critical fact—relating to the alleged duress—was supported by substantial evidence which reasonably persuaded the trier of facts. We also urge that where, as here, the questioned finding goes only to the sufficiency of an affirmative defense, as to which the

burden of proof would normally rest on the proponent, it would be particularly inappropriate to require that the finding be made with any higher degree of persuasion than that displayed in the decisions of the inquiry officer and the Board. We further urge that any higher standard that might be advocated in the case of a longtime resident is inapplicable to these proceedings which were commenced five years after petitioner's arrival in this country. Finally, we contend that a review of the record plainly shows that the court below did not err in holding that the order was sustained by reasonable, substantial and probative evidence.

Petitioner's alternative contention is that the court of appeals erred in failing to remand the case to the Attorney General for the taking of additional evidence as petitioner requested. Petitioner relies on 5 U.S.C. 1037(c),⁴ which authorizes such remand upon a satisfactory showing that the applicant has additional, material evidence to adduce and that there were reasonable grounds for the failure to adduce such evidence previously. We show that, since petitioner made no showing whatsoever with respect to either of the statutory prerequisites, her contention here is without merit.

I

THE ATTORNEY GENERAL FOUND THE FACTUAL GROUNDS FOR DEPORTATION PERSUASIVELY ESTABLISHED, AND HIS ORDER IS SUPPORTED BY REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE.

Petitioner's principal contentions are that the findings of the special inquiry officer and the Board of

⁴ See footnote 1 at p. 2, *supra*.

Immigration Appeals are not supported by "reasonable, substantial and probative evidence" and that the facts were not found by them with the requisite degree of persuasion. This objection is necessarily directed to a narrow question of fact. Petitioner does not controvert the findings that (a) she is not a citizen or national of the United States, (b) that she entered the United States on February 7, 1956, and (c) that she engaged in prostitution after entry. Controversy is therefore confined to petitioner's plea that her engagement in prostitution was induced by duress.

Both the inquiry officer and the Board found petitioner's tale of the sick child and the opportune vacuum cleaner salesman implausible; they characterized it as "a hard story to believe" (R. 78) and "bizarre" (R. 112). The credibility of the story was not enhanced by the many inconsistent versions which petitioner proffered and her admissions of falsification (R. 27, 39). Nor was there any objective evidence—*e.g.*, evidence that she forwarded \$300 to her husband, leases, telephone toll records—to support petitioner's claim. Indeed, a comparison of petitioner's affidavit of May 1963 (R. 120-121) and her brief in this Court (Br. p. 9) suggests that her counsel are still unable to sort out a consistent account of her activities.⁵

⁵ Petitioner's affidavit (filed with the Board in support of her motion to reconsider) states that she engaged in prostitution from February to April 1957, that in April she fled from Dayton to Knoxville to escape her procurer, Tom Wally, and that she remained in Knoxville for three months until she returned to Dayton on July 4, 1957. Petitioner's brief urges that the record clearly shows that she engaged in prostitution for the two months following April 1, 1957, that she then (presumably in June) went to Knoxville, returning to Dayton

Notwithstanding these difficulties with petitioner's story, both the inquiry officer and the Board accepted the premise that she embarked on prostitution to raise \$300 for her son's operation. Furthermore, they assumed that petitioner's anxiety for her son could be sufficiently compelling to warrant a defense of duress. They thus declined to determine whether petitioner's circumstances were not somewhat less compelling than those previously held to warrant a finding of duress. See *Matter of M*, 7 I. & N. Dec. 251. Without questioning either the truth of petitioner's story or its legal sufficiency, they nevertheless found that the alleged duress was not coextensive with the prostitution for which it was supposed to account. Thus the Board found that "[e]ven if the respondent's story is to be believed" and "even if it be conceded that the circumstances under which she entered the practice of prostitution may have amounted to duress," nevertheless "it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958, long after she had repaid the loan to the vacuum cleaner salesman" (R. 112). The Board concluded that under these circumstances the prostitution "cannot be defended on the ground of duress" (*ibid.*). Similarly, the inquiry officer found that "if her story about the loan be believed" and "[i]f as a matter of law the story she tells should make the defense of

on July 4 (Br. p. 9). Elsewhere, however, petitioner's Brief recognizes that her stay in Knoxville lasted "several months" (Br. 7). In addition, petitioner testified (R. 30-31) that she went to Knoxville because her landlord found out "that this Jo was practicing prostitution in my apartment" rather than in an attempt to escape from Tom Wally.

duress available," the evidence demonstrated that the prostitution continued until "long after she had repaid the salesman's loan" (R. 77, 78).

The factual controversy is thus narrowed to the question of when petitioner's activities as a prostitute terminated. Although petitioner urged that her illicit activities continued no longer than the two months needed to repay Tom Wally, or perhaps an additional two weeks (R. 23, 45-46), she also repeatedly associated their discontinuance with the beginning of her acquaintance with Anthony Amicon. In her pre-hearing statement she said "I met Mr. Amicon and he was the one who made me realize what I was doing" (R. 24). Also, "It was after I met Mr. Amicon that I quit the arrangement with Mr. Wally" (R. 25).^{*} Similarly, at the second hearing she testified concern-

^{*} Petitioner objects (Br. 16) to the administrative findings insofar as they were based on her own sworn pre-hearing statement (R. 9-34) or that of Amicon (R. 1-8). This contention was not raised in the court of appeals and is without merit. While the judicial rules of evidence are inapplicable to administrative proceedings (see *Bridges v. Wixon* 326 U.S. 135, 153-156, 175-176; Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c), now recodified as 5 U.S.C. 556(d)) even under those rules it would have been proper to receive petitioner's own prior statement as within the admissions exception to the hearsay rule. See McCormick, *Evidence* (1954), Section 239. Both her statement and Amicon's were also admissible under the governing regulations. 8 CFR 242.14(c); Amicon testified at the hearing, was cross-examined by petitioner's counsel (R. 53), and reaffirmed the truth of his prior statement (R. 49), with one minor and immaterial correction (R. 50). The receipt of his statement was not objected to (R. 52). Contrary to petitioner's suggestion (Br. 16), petitioner's counsel plainly did have an opportunity to examine her statement before it was received at the hearing (R. 38); moreover, she had been accompanied by counsel when the statement was made (R. 9).

ing the termination of her activities (R. 46); "See, I met Mr. Amicon. He asked me—told me what I was doing." The proposition that petitioner did not abandon prostitution prior to her meeting with Amicon is strongly supported by additional testimony. Concerning her first meeting with Amicon, petitioner testified as follows (R. 25-26):

Q. The first time you met Mr. Amicon didn't he come to your apartment to have sexual relations with you?

A. Yes, he came for that but he did not after he came.

Q. Did he leave money in your room the first night he met you?

A. Yes.

Q. Why did you not have sexual relations with Mr. Amicon?

A. I guess he didn't want it after he met me.

Q. Did Mr. Wally send Mr. Amicon to you?

A. No, somebody else sent him.

The foregoing account was corroborated by Amicon's testimony that petitioner was first introduced to him as a prostitute, that he went to her apartment at her request to avail himself of her services, and that he "couldn't go through with it" but "left the money anyway" (R. 2-3, 50). Since, by all accounts (R. 120-121; Br. for Pet. 4), petitioner did not meet Amicon until long after her indebtedness to Tom Wally had been paid off, the continuation of her engagement in prostitution until that meeting completely undermined the claim of duress. Whether petitioner met Amicon in October (R. 50, 119) or December 1957 (R. 4) or not until late in 1958 as the

testimony of Mrs. Jackson suggests (R. 68) is not critical, although the last date seemed more probable to the inquiry officer (R. 77; see R. 111-112).

Finally, additional testimony confirms the conclusion that petitioner's activities were not limited to her arrangement with Wally. Thus Amicon, certainly a witness friendly to petitioner, testified that petitioner's involvement in prostitution stemmed not only from the vacuum cleaner salesman (R. 7) but also: "* * * there was a woman who owned the house, and from what Mrs. Woodby said this woman was in the business of a house for prostitutes, and that is what happened" (R. 6). Amicon also admitted that he had been arrested twice in police raids at petitioner's apartment. On one of those occasions, on February 27, 1959, he had made a written statement to the police that he was paying petitioner for prostitution. Although he testified that that statement was untrue and was made to help her (R. 5; see also R. 42-43), it is not clear what help such a statement might afford. Petitioner also admitted having sexual relations with men introduced to her by persons other than Wally, from whom she received gifts of money (R. 13, 17-18, 26). In sum, petitioner's own testimony and that of her friends wholly discredited her plea that her engagement in prostitution was caused by and was coterminous with duress; the evidence most persuasively supported the finding that the prostitution continued after the compulsion, if any, had ceased.

Deportation is without question "a drastic measure" (*Fong Haw Tan v. Phelan*, 333 U.S. 6, 10); it is certainly not to be invoked where the fact-finder is not affirmatively persuaded by reasonable, substantial

and probative evidence that the grounds therefor have been established. In our brief in *Sherman v. Immigration & Naturalization Service* (No. 80, this Term) we have discussed at length the degree of persuasion with which facts are to be found and the scope of judicial review of such findings, and it seems unnecessary to repeat that discussion here. We think that, on the present record, the court of appeals clearly did not err in holding that the deportation order is "supported by reasonable, substantial and probative evidence" (R. 132). Similarly, we think that the decisions of the special inquiry officer and the Board actually reflect a high degree of persuasion based on the testimony. The inquiry officer found that the chronology of events derived from the testimony was "decisive" (R. 77). And the Board, while resolving all doubtful points in petitioner's favor, found that "it is clear from the evidence that she continued to practice prostitution until at least late 1957 or 1958" (R. 112). Accordingly, unless the administrative officers charged by Congress with the duty of finding the facts are required, as petitioner suggests (Br. 11), to be satisfied "beyond a reasonable doubt," there is no basis for overturning the result below.

For the reasons indicated in our brief in *Sherman, supra*, we do not believe that the reasonable doubt standard is applicable in deportation proceedings. Additional factors make it particularly inappropriate here. *First*, duress has traditionally been viewed as an affirmative defense, to be pleaded and proved by the party relying on it. See Fed. R. Civ. P. 8(c); *Mason v. United States*, 17 Wall. 67, 74; *Klamath Indians v. United States*, 296 U.S. 244, 253; *Mc-*

Cormick, *Evidence* (1954) Section 318. That petitioner bore the burden of proof with respect to the issue of duress is consistent with the usual allocation of that burden and is conceded by petitioner (Br. 14).⁷ It would therefore seem singularly inappropriate to require the government to prove non-duress beyond a reasonable doubt. Even if the burden is on the government to rebut the defense once it has been raised, it would seem sufficient to demonstrate persuasively, from petitioner's own testimony, that the supposed duress falls short of explaining the admitted prostitution. *Secondly*, unlike the petitioner in *Sherman, supra*, who had been a resident of the United States for some forty years, these proceedings were commenced within five years after petitioner's arrival. Whatever added evidentiary rigor might appropriately be imposed in the case of the long-term resident is, therefore, inapplicable here. Compare *Rowoldt v. Perfetto*, 355 U.S. 115, 120.

II

THE COURT OF APPEALS DID NOT ERR IN DECLINING TO REMAND THE CASE TO THE ATTORNEY GENERAL FOR THE TAKING OF ADDITIONAL EVIDENCE PURSUANT TO 5 U.S.C. 1037(c)

Petitioner urges that the court of appeals erred in failing to remand the case to the Attorney General for the taking of additional evidence as authorized

⁷ It should be noted that *Mar Gong v. McGranery*, 109 F. Supp. 821 (S.D. Cal.), cited by petitioner in this connection (Br. 14), was reversed on other grounds in *Mar Gong v. Brownell*, 209 F. 2d 448 (C.A. 9).

by 5 U.S.C. 1037(c).^{*} Although petitioner requested such relief in the court of appeals, petitioner did not even attempt to bring herself within the terms of Section 1037(c). That section provides that a court of appeals may grant an application "for leave to adduce additional evidence" upon a showing "to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency" (5 U.S.C. 1037(c)). Neither in the court of appeals, nor (were it relevant) in this Court, has petitioner given any indication of what additional evidence she would adduce, let alone that it is material and that there were reasonable grounds for her previous failure to adduce it. Accordingly, there was simply no legal basis for the invocation of Section 1037(c).

It should be recognized, moreover, that petitioner has now told her story under oath on at least three occasions (R. 9, 54, 120); Anthony Amicon has done so twice (R. 1, 49); and petitioner has called two additional, friendly witnesses (R. 67, 70). Such conflicts and discrepancies as there are in the record are largely the product of the divergent accounts which petitioner has given of her activities. In these circumstances it is hardly evident what purpose could be served by a reopening. In all events, petitioner has made no showing of the additional evidence she would present if afforded the opportunity.^{*}

^{*} See footnote 1, p. 2, *supra*.

^{*} It should also be noted that petitioner has never attempted to avail herself of the discretionary relief authorized under Sections 212(h) and 245 of the Act (8 U.S.C. 1182(h) and 1255)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1966.

for an alien who is a close relative of a United States citizen upon a showing that the deportation of such alien "would result in extreme hardship to the United States citizen". Although, in light of petitioner's status as the mother of two minor citizens, such application was expressly invited by the special inquiry officer (R. 72), the invitation was declined, and no subsequent application has been made. The special inquiry officer, in his decision (R. 78-79), nonetheless considered petitioner's eligibility for such relief *sua sponte*. Since the evidence before him indicated that petitioner's children were in the custody of their paternal grandparents, he could find "no basis for considering that her deportation would result in extreme hardship to her children" (R. 79). Notwithstanding that finding, it remains open to petitioner to show, upon proper application, that the facts relevant to such relief were other than those found, or have subsequently changed, or that relief is warranted for some other reason.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.

FILED

NOV 10 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 40

ELIZABETH ROSALIA WOODBY,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM 1901

No. 2

ELIZABETH ROSSALL WILSON

Respondent

IMMIGRATION & NATURALIZATION SERVICE

Appellant

Appeal from the Circuit Court of Appeals for the Fifth Circuit

WRIT OF HABEAS CORPUS FOR THE PETITIONER

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THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAYTON, OHIO

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

- I. WERE THE DECISIONS OF THE BOARD OF IMMIGRATION APPEALS AND ALSO OF THE SPECIAL INQUIRY OFFICER SUPPORTED BY "REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE"; AND PARENTHETICALLY WHAT DOES "REASONABLE, SUBSTANTIAL AND PROBATIVE MEAN? MUST THE GOVERNMENT PROVE THE FACTS ON WHICH THE DEPORTABILITY OF THE ALIEN DEPENDS, BY A MERE PREPONDERANCE OF THE EVIDENCE, OR DOES IT HAVE A GREATER BURDEN?

The burden of proof in this as in other deportation cases, rests upon the Government to prove the facts which relate

to the deportability of an alien. (See Footnote 9, Brief for the Respondent, *Sherman v. Immigration and Naturalization Service*, No. 80, October Term, 1966, in which the Respondent stated "Although the statute is silent on the point, it is undisputed that the burden of proving deportability is on the Government.") The Petitioner in this case has set up certain salient facts which proved that she was acting under duress for approximately a two month period of time during which time the alleged prostitution took place. The Special Inquiry Officer and the Board of Immigration Appeals found, that even if the Petitioner were acting under duress, for this two month period of time, that she still engaged in acts of prostitution after the duress had ended. The Petitioner does not argue that the duress continued beyond approximately June 1, 1957, but rather that she did not engage in any acts of prostitution after that date. The Immigration and Naturalization Service, having accepted the argument that the Petitioner was acting under duress for the two month period of time ending approximately June 1, 1957, the necessary or required burden of proof is upon the Immigration and Naturalization Service to prove that the Petitioner did, in fact, engage in acts of prostitution after June 1, 1957. The Respondent has the burden of proving the positive fact that the Petitioner did voluntarily engage in acts of prostitution after the date in question.

In the Case of *Miller v. Kruggel*, 165 Kan. 435, 195 P. 2d. 597, 599 (1948), the Court stated:

"It has sometimes been said that when a party to an action has made a prima facie case the 'burden of proceeding' or the 'burden of evidence' then shifts to his adversary. This is simply a way of saying that upon a prima facie case, a litigant is entitled to prevail if this adversary offers no evidence. The necessity of offering evidence to offset an adversary's prima

facie case in no way shifts the burden of proof, which continues to rest upon the party which has it."

The burden of proof in this case is upon the Respondent. If the Petitioner voluntarily engaged in acts of prostitution, then she is subject to deportation. If, on the other hand, the acts of having engaged in prostitution were involuntary, and under duress, then the Petitioner has not exercised her free will, and she is therefore not subject to deportation. See *Matter of M.*, 7 I & N Dec. 251. In the case of *Nishikawa v. Dulles*, 356 U.S. 129 (1959) this Court in a expatriation case where the defense of duress was being used by the Petitioner, held that the burden was upon the Government to prove that there was no duress at the time of the alleged expatriation, and that the act showing renunciation of citizenship was voluntarily performed. Compare this case with Footnote 4 on Page 16 of the *Amica Curiae* Brief filed in the case of *Sherman v. Immigration and Naturalization Service*, No. 80 October Term 1966.

Once it has been established that the burden is upon the Respondent, the next determination that must be made, is; what burden or degree of persuasion must it bear? May this Court determine that the required proof is by "clear and convincing" proof; or by proof "beyond a reasonable doubt"? The Respondent contends that neither the standard "clear and convincing," nor the standard "beyond a reasonable doubt" are appropriate, because the statute (8 USC 1105 a(4)) provides the standard to be "reasonable, substantial and probative evidence." When examining these terms closely, we find that they are mutually exclusive. The standard "reasonable, substantial and probative" refers to the quality of the evidence presented (See *Chow Sing v. Brownell*, 235 F. 2d 602 at 604, 1956), while the standards "clear and convincing" and "beyond a reasonable

doubt" refer to the burden of Proof, and not to the quality of the evidence. The Respondent concedes that the statute is silent as to the burden of proving deportability. (See Footnote 9, Brief for the Respondent, *Sherman v. Immigration & Naturalization Service*, No. 80, October Term, 1966.) It is therefore appropriate to note that Congress, by speaking as to the quality of the evidence required, has not spoken as to the burden of proof required and therefore it is singularly up to this Court to determine what degree of burden of proof is to be required in this type of proceeding, i.e., by "clear and convincing" proof, or proof "beyond a reasonable doubt."

Since "reasonable, substantial and probative" refers to the quality of the evidence produced, this phrase is obviously intended to refer to the standard to be used on review to determine if the special inquiry officer used the correct burden of persuasion, i.e., proof "beyond a reasonable doubt" or by "clear and convincing" proof, when making his finding. His finding would be sustained if the quality of the evidence reviewed (reasonable, substantial and probative) was such that when the special inquiry officer weighed the evidence, he used the correct burden of persuasion, and there was sufficient evidence to support his finding.

In order for the Petitioner to be found deportable, it is necessary for the Court to find that she engaged in the criminal act of practicing prostitution. A finding of her having engaged in such a criminal act would necessarily carry along with it deportation, a grave consequence of taking this mother from her two minor children, and further carrying with it the stigma of a criminal act.

The impact of the decision concerning the engagement in acts of prostitution by the Petitioner is so closely akin to a criminal finding that the criminal standard should be applied. She would have the stigma of having been found

by a Court to be a prostitute. There is certainly no more stigma by having the Municipal Court of Dayton, Ohio find that the Petitioner engaged in acts of prostitution in a criminal case, than by having the Supreme Court of the United States find that the Petitioner engaged in acts of prostitution, in this case, because she still would be subject to deportation under the same section of the Code, whether convicted or not (8 U.S.C. 1182 (a) (12).) (See page 21, Brief for the Respondent, *Sherman v. Immigration and Naturalization Service*, No. 80, October Term, 1966.) The children of the Petitioner would also have the stigma of their mother having been found to be a prostitute. With this factual situation with these grave consequences involved, and with these stigmas present, the appropriate standard of proof that should have been used is proof "beyond a reasonable doubt" or at least "clear and convincing" proof, and not, proof by a "preponderance of the evidence."

There is a certain amount of confusion present in the testimony of the Petitioner and the witnesses. This confusion relates to time rather than to events. The Petitioner contends that she terminated her arrangement with Mr. Wally at the time the \$300.00 was repaid to him (R. 23). The Respondent is attempting to show that the Petitioner engaged in prostitution after the \$300.00 was repaid. It is clear that the Petitioner met Mr. Amicon after she terminated her arrangement with Mr. Wally (R. 23 and 24).

Q. Why did you terminate this arrangement with Mr. Wally? A. Because I had my \$300.00.

Q. These various other men you have named, Mr. Kincaid, Mr. Amicon, and Mr. Waddell, did you have relations with these men during the same period you were receiving men from Mr. Wally? A. No sir. I met Mr. Amicon and he was the one who made me realize what I was doing.

Q. These men previously named, did you meet them after you terminated your arrangement with Mr. Wally? A. Yes.

Q. All of them? A. Yes.

Q. Have you engaged in sexual relations with any other men since the termination of your arrangement with Mr. Wally? A. Not for payment.

Some confusion is added by some of the Petitioner's answers when she stated (R. 46): "I don't want to lie—I think it was another two weeks. See, I met Mr. Amicon. He asked me—told me what I was doing." This answer is explained by an answer to another question of the Petitioner (R. 24) when she stated:

Q. Are you now aware that the relations you had with men who were sent to you by Mr. Wally was prostitution? A. I did not recognize it as that.

Q. Do you know now? A. Now I know, yes.

The Petitioner did not at that time or until some time after realize that what she was doing was prostitution because she had been reduced to such a mental state that her sole thought was to attempt to save the life of her child. See *Schioler v. United States*, 75 F.S. 353. *Nikashima v. Atcheson*, 98 F. S. 11.

The Petitioner, by her answer, was not stating that she had engaged in prostitution until she met Mr. Amicon, but rather that Mr. Amicon was the one who explained to her and made her realize what she had been doing. The respondent is attempting to infer from this that the Petitioner continued to engage in acts of prostitution until the time she met Mr. Amicon. This fact is refuted by Mr. Amicon's testimony (R. 7) when he was asked:

Q. . . . do you know why she continued practicing until she started her relationship with you? A. You would have to ask her. I don't believe she was in it continuously.

There was no showing in the Respondent's case that the Petitioner engaged in acts of prostitution between June 1, 1957 and the time when she met Mr. Amicon. The only testimony in the record relating to the Petitioner's engagement in prostitution at the time she met Mr. Amicon are bits of testimony which reflect the confusion that surrounded the entire hearing. Much of the testimony that is referred to by the respondent refers to the prior statement made by the Petitioner which she repudiated.

It is true that the Petitioner possibly cannot be considered a long time resident alien, for she has only been in this country for approximately twelve (12) years. She does, however, have two minor children who are American citizens, and which children she does visit. It was not until approximately December, 1965, when the Petitioner was able to obtain visitation rights with her own children, the custody of whom was granted to the grandparents by the Harlan County, Kentucky Circuit Court. The Petitioner therefore does have certain family ties here in this country, which in the eyes of a mother, make it as important for her to stay here as life itself. These facts certainly make a higher standard than by a "preponderance of the evidence" appropriate.

It is interesting to note that the Respondents has referred to the fact that the Petitioner has not availed herself of the discretionary relief authorized under Sections 212 (h) and 245 of the Act. (8 U.S.C. 1182 (h) and 1255.) These sections that authorize discretionary relief are apparently not open to the petitioner if she is found to have engaged in prostitution after entry, which findings would therefore directly relate to her good moral character.

II. DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMIT ERROR BY NOT RETURNING THIS CASE TO THE UNITED STATES DEPARTMENT OF JUSTICE, DIVISION OF IMMIGRATION SERVICE TO ADDUCE ADDI-

TIONAL EVIDENCE AS REQUESTED IN THE PRAYER FOR RELIEF IN THE BRIEF FILED BY THE PETITIONER IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THIS CAUSE.

It seems that in the interest of justice, the Immigration and Naturalization Service would be interested in finding out exactly when the duress in this case did cease; that they would be interested in finding out exactly when the Petitioner's alleged prostitution ceased. They brought in no witnesses other than the Petitioner who admitted what she did and told why she did it. Since the Petitioner was found to have committed acts of prostitution after the duress had ceased, she desired to bring in evidence to show that she did not engage in acts of prostitution after that date. The Respondent now claims that this would serve no purpose. Its only purpose would be to show what really happened and when it happened.

Possibly there was not a technical compliance with the statute before the Court of Appeals for the Sixth Circuit but that Court was requested in the briefs of the Petitioner to permit a remand of the case to the Department of Justice so that this time sequence, which appears to be a major portion of this case, could be straightened out.

CONCLUSION

The Judgement of the Court of Appeals should be reversed.

Respectfully submitted,

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UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

NO. 10

JOSEPH HERRMAN, Author

V.

IMMIGRATION AND NATURALIZATION

OFFICE OF THE COMMISSIONER

OF IMMIGRATION AND NATURALIZATION

WASHINGTON, D. C.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

NO. 80

JOSEPH SHERMAN, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the three-judge panel which first decided the case (R. 83-95), holding that the deportation order should be set aside, is reported in 350 F.2d 894. The opinion of the court en banc affirming the deportation order on the government's petition for rehearing (R. 96), is reported in 350 F.2d 901.

JURISDICTION

The judgment of the court below (R. 97) is dated and was entered on January 18, 1966. The petition for certiorari was filed on March 3, 1966, and was granted on

April 18, 1966 (R. 98). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 106(a) of the Immigration and Nationality Act, added by 75 Stat. 651 (1961), 8 U.S.C. § 1105a(a), provides in part as follows:

"Judicial Review of Orders of Deportation and Exclusion

"Sec. 106.(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that —

"(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

*** * * * ***

"(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive;"

§ 242(b) of the Immigration and Nationality Act, 66 Stat. 209 (1952), 8 U.S.C. § 1252(b), provides in part as follows:

"(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make

determinations, including orders of deportation Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that —

* * * * *

"(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

QUESTION PRESENTED

In a deportation proceeding against a long-time resident alien, must the government prove the facts on which deportability depends by more than a bare preponderance of the evidence?

STATEMENT OF THE CASE

Joseph Sherman, the petitioner, was born in Poland in 1906. In 1920, aged 14, he entered the United States in the company of his mother and three sisters and was admitted for permanent residence. (R. 64-65, 74, 84.)

On March 14, 1963, the Immigration and Naturalization Service instituted deportation proceedings against petitioner, alleging that on December 20, 1938, he had reentered the United States without inspection and was therefore deportable under § 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (R. 1).

It was the Service's theory at the administrative hearing that petitioner had left the United States in June 1937, in order to fight on the loyalist side in the Spanish civil war, and had returned to the United States in December 1938, bearing a passport issued under the name of Samuel Levine (R. 74-76, 84).

The Service introduced evidence that in June 1937, petitioner applied for and received a United States pass-

port under the name of Samuel Levine. It was established that someone traveled to Europe on this passport in June 1937, aboard the SS Acquitania, and that someone entered the United States on this passport on December 20, 1938, aboard the SS Ausonia. There was no evidence identifying petitioner as the individual or individuals who had utilized the passport. (R. 75, 85.)

The only evidence that petitioner had ever left the United States was the testimony of Edward Morrow, given in February and June 1964, twenty-seven years after the events to which it pertained (R. 85-86, 13, 17, 39, 49, 75-76).

Morrow had served with the loyalist forces in Spain in 1937 and 1938. He had left the United States in June 1937 aboard the SS Acquitania and had returned in December 1938 aboard the SS Ausonia. (R. 17-19, 70, 81.)

In April 1963, an investigator for the Immigration and Naturalization Service showed Morrow the passport photograph (and its enlargement) of "Samuel Levine." Morrow told the investigator "that the person represented thereon appears vaguely familiar to him and believes he may have been on the 'Acquitania' sailing with him in June 1937. However, he could not recall anything specific regarding that person and could not further identify him. When asked if the name Joseph or Joe Sherman or Samuel or Sam Levine had any significance to him, or if a person bearing such name had been on the SS 'Acquitania' trip abroad in June 1937 or on the SS 'Ausonia' return voyage in December 1938, with him, he stated that he could not recognize the name. When furnished additional background data regarding the subject, he again advised that he could not tie it in with the person represented by the photograph." (R. 82, 40-46.)

On February 25, 1964, just before testifying at the administrative hearing, Morrow was placed by a Service investigator where he could secretly observe petitioner. After conducting this observation of petitioner for about

half an hour, Morrow advised the investigator that he recognized petitioner, whereupon the Service decided to utilize Morrow as a witness. (R. 46-47, 60, 76.)

Morrow then testified that he had seen petitioner about 20 times in Spain and that petitioner had been in the Transportation Corps there (R. 18, 35, 62). Morrow could not identify any particular occasion on which he had seen petitioner in Spain (R. 18-19), admitted that petitioner had not been in his unit (R. 61), and could not recall having had any "personal" or "direct" contact or conversation with petitioner (R. 18, 26, 32) or having ever been introduced to him (R. 38).

Directly reversing his pre-hearing statement to the Service, Morrow testified that he did not know whether petitioner had travelled to Spain with him, but that petitioner had been with him on the SS Ausonia on the return voyage to the United States (R. 19).

Morrow admitted that it was possible that his identification of petitioner was mistaken (R. 61). When asked whether he was positive that he had seen petitioner in Spain, he answered, "Positive — No. But I feel I saw this man in Spain" (R. 62).

The Special Inquiry Officer, ruling that the "collateral discrepancies and contradictions" in Morrow's testimony "create an aura of credibility and reliability to the witness' testimony as a whole" (R. 71), sustained the charge against petitioner and ordered his deportation (R. 72). The Board of Immigration Appeals affirmed (R. 81).

On review by the Second Circuit, the case was first heard by a three-judge panel consisting of Circuit Judges Waterman, Friendly and Smith. On September 22, 1965, the panel, Judge Friendly dissenting, issued a decision setting aside the deportation order and remanding the case to the Immigration and Naturalization Service. (R. 83-95.) The majority held that in deportation cases against long-time resident aliens the government has a

"higher burden of persuasion" (R. 90) than the ordinary civil rule that "the party having the burden of proof need only prove the existence of facts on which he relies by a preponderance of the evidence" (R. 89). The majority ruled that the government's burden in such cases is to prove its case "beyond a reasonable doubt" (R. 92), and remanded for administrative reconsideration on that basis.

Judge Friendly dissented on the ground that §§ 242(b) and 106(a)(4) of the Immigration and Nationality Act establish "reasonable, substantial and probative evidence" as the standard of proof in deportation cases (R. 93-95).

The government moved for a rehearing en banc. The motion was granted, and the en banc court, Judges Waterman and Smith dissenting, sustained the deportation order for the reasons stated in Judge Friendly's dissenting opinion. (R. 96.)

SUMMARY OF ARGUMENT

A.

In proceedings to expel a resident alien, the burden of proof is on the Immigration and Naturalization Service. The burden is defined by the Board of Immigration Appeals as that of proving deportability by a preponderance of reasonable, substantial and probative evidence. This was the standard by which petitioner was found deportable.

B.

Four possible standards of proof were mentioned in the opinions below. Under Judge Friendly's view, the standard is simply "reasonable, substantial and probative evidence." This relieves the Service of carrying the burden of proof. The other possible standards are preponderance of the evidence, proof beyond a reasonable doubt, or "clear, unequivocal and convincing evidence."

The differences in the standards are not academic.

C.

Contrary to Judge Friendly's opinion, §§ 106(a)(4) and 242(b)(4) of the Immigration and Nationality Act do not establish the standard of proof required in the administrative hearing. As appears from their text and legislative history, the sections merely enact the substantial evidence rule for the purposes of judicial review. Moreover, § 242(b)(4) relates to the quality of the evidence in support of deportability and not to the degree of persuasion engendered by the evidence on both sides.

Accordingly, the Court is free to exercise the traditional judicial function of devising an appropriate standard of proof.

D.

A higher standard than preponderance of evidence, preferably the criminal standard, should apply in all deportation cases involving resident aliens who have been admitted for permanent residence,

In denaturalization and expatriation cases, the Court requires compliance with the "clear and convincing evidence" standard because such cases seek to revoke a "once conferred," "precious" right. The same rationale applies to deportation cases against resident aliens, and the facts of recent deportation cases indicate that the Court has applied such a standard.

It would be even more appropriate to require compliance with the criminal standard of proof beyond a reasonable doubt. This is because deportation of resident aliens is penal in its consequences, in the grounds for deportation, and in the procedures by which deportation is effected.

E.

Since the administrative agency applied an erroneous principle of law in reaching its decision, the judgment

below must be reversed. However, the proper course is to direct termination of the deportation proceedings, rather than administrative reconsideration, because the evidence plainly does not satisfy the appropriate standard of proof.

The case against petitioner, a long-resident alien, depends on an uncertain, vague and belated identification by a witness testifying to casual encounters of 27 years before, in a manner seriously inconsistent with his prior statement to the Service. This testimony is not "reasonable, substantial and probative evidence." By no possibility can it satisfy either the standard of proof beyond a reasonable doubt or the "clear, unequivocal and convincing" standard.

ARGUMENT

The administrative decision that petitioner is deportable was made by applying an erroneous standard of proof. Under the correct standard, deportability has not been proved.

***A. Petitioner was found deportable by a
preponderance of the evidence.***

When the government seeks to expel a resident alien, the burden of proving the facts establishing his deportability is on the Immigration and Naturalization Service. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153; *Chew v. Rogers*, 257 F.2d 606 (D.C. Cir.); *Ben Huie v. Immigration & Naturalization Service*, 349 F.2d 1014, 1017 (9th Cir.); *Wood v. Hoy*, 266 F.2d 825, 830 (9th Cir.); *Tutrone v. Shaughnessy*, 160 F. Supp. 433, 438 (S.D. N.Y.). That the burden of proving deportability is on the Service is also clearly implied by § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, which finds it necessary to provide expressly that in deportation proceedings the burden of proof is on the alien to show the time, place and manner of his entry into the United States. The gov-

ernment concedes petitioner's lawful entry in 1920, and acknowledges that the burden of proving the charge of entry without inspection in 1938 was properly on the government. See government's Opposition to the petition for certiorari, p. 6, fn. 5. Both the special inquiry officer (R. 67) and the Board of Immigration Appeals (R. 74) recognized that the Service had the burden of proving petitioner's deportability.

The extent of the Service's burden is defined by the Board of Immigration Appeals as follows: "Ordinarily in deportation proceedings, the Service must establish its case by a preponderance of reasonable, substantial and probative evidence." *Matter of H*, 3 I & N Dec. 441, 449. See also *Matter of Peralta*, 10 I & N Dec. 43, 46; *Matter of V*, 7 I & N Dec. 460, 463. We do not understand the government to dispute that this preponderance standard was employed here as a matter of course by the Board of Immigration Appeals, the ultimate finder of the facts in the administrative proceeding.¹ Moreover, as we later show, the evidence of deportability does not satisfy a higher standard than that of preponderance.

B. The possible standards of proof.

The question here is whether, in the administrative proceeding against petitioner, a long-time resident alien, the Service was obliged to prove its case by more than a preponderance of the evidence. This question does not directly concern the nature or scope of judicial review, although that may be affected by the rule governing the necessary quantum of proof in the administrative proceeding.

¹ The initial fact-finder, the special inquiry officer, ruled that "the burden of establishing deportability by reasonable, substantial and probative evidence is on the Government" (R. 67). If he meant by this a different standard of proof than that applied by the Board, which we doubt, it was nevertheless incorrect for reasons later stated.

Four possible standards of proof were mentioned in the opinions below, and it is desirable to examine these before considering which is the correct standard.

Judge Waterman's opinion held (R. 92) that in cases involving long-time resident aliens the criminal standard of proof applies so that the Service must prove deportability "beyond a reasonable doubt."

Judge Friendly, whose dissenting opinion was eventually adopted by the majority of the en banc court (R. 96), stated (R. 93), "If the slate were clean, I might well agree that the standard of persuasion for deportation should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail." Judge Friendly held (R. 95), however, that Congress had established a statutory standard of "reasonable, substantial and probative evidence" which "applies in all deportation cases - both to the Service and to the courts."

Judge Friendly's view relieves the Service from carrying any burden of proof; the Service may prevail so long as it produces substantial evidence of deportability, even if its case is outweighed by substantial evidence to the contrary.

The preponderance of evidence standard is satisfied by "just more than an even balance of the evidence." *Matter of V*, 7 I & N Dec. 460, 463. It requires merely that the evidence on one side be more convincing to the trier of fact than the contrary evidence. McCormick, Evidence (1954) § 319. Of course, the evidence of deportability must also be "substantial," but this requirement "is something less than the weight of the evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620.

To meet the preponderance of evidence standard, the burden is to show that the claimed fact is "more proba-

bly true than false." Under the "clear and convincing" standard, the claimed fact must be "highly probably" true. Under the criminal standard, the claimed fact must be "almost certainly" true. McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 246-47, 253-54, 258, 261-62, 265 (1944).

These distinctions are not academic. Thus in cases in which the "clear, unequivocal and convincing" standard is applicable, the Court has reversed for insufficiency of evidence judgments supported by a preponderance of the evidence. *Lalone v. United States*, 164 U.S. 255; *Schneiderman v. United States*, 320 U.S. 118; *Nowak v. United States*, 356 U.S. 660; *Chaunt v. United States*, 364 U.S. 350; *Nishikawa v. Dulles*, 356 U.S. 129.

In what follows, we will first show that, contrary to Judge Friendly, Congress has not provided a statutory standard for the burden of proof and that the Court is free to fashion an appropriate standard. We will next show why the Court should adopt a higher standard in cases of resident aliens than that of preponderance of the evidence, preferably the criminal standard. Finally, we will show that the evidence in this case does not meet a higher standard than preponderance, so that the proper remedy is to direct a termination of the deportation proceedings rather than a remand for administrative reconsideration.

C. The standard of proof in deportation cases has not been prescribed by Congress, and the Court is free to adopt an appropriate standard.

Judge Friendly's opinion holds that §§ 106(a)(4) and 242(b)(4) of the Immigration and Nationality Act, quoted *supra*, pp. 2-3, enact the standard of proof for deportation cases, and that this standard, which merely requires "reasonable, substantial and probative evidence," applies "both to the Service and to the courts" (R. 95). The holding is incorrect.

For reasons we later state, and as unanimously noted by commentators on this case,² the sections merely state a standard for judicial review. They do not define the standard of proof required in the administrative hearing. In fact, the sections do not even say on whom the burden of proof is located in the administrative proceeding. If Judge Friendly is right, then, contrary to universal belief, including that of the government (*supra*, pp. 8-9), the special inquiry officer and the Board may place the burden of proving non-deportability on the alien. And even if the alien carries this burden, he may still be ordered deported so long as there is substantial evidence of deportability.

Nor is it possible to deduce from the reviewing standard the standard of proof at the evidentiary hearing, much less to assume that the two are the same. In criminal cases the usual standard of appellate review requires the jury's verdict to stand if supported by substantial evidence. *Rutkin v. United States*, 343 U.S. 130, 135; *Stilson v. United States*, 250 U.S. 583, 588; *United States v. Tutino*, 269 F.2d 488, 490 (2d Cir.). It has never been thought that these holdings are inconsistent with the rule that in a criminal trial guilt must be proven beyond a reasonable doubt. As Professor Jaffe has pointed out, Judge Friendly's view erroneously "merges the function of factfinder with that of reviewing court; it argues that the factfinder is to find for the Government if he concludes that this finding should not be reversed by a court. But that is not the task of the factfinder, nor is it the attitude that he is to take toward his task." *Op. cit. supra*, at 915.

² Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 Harv. L. Rev. 914, 915 (1966); Note, *Standard of Proof in Deportation Proceedings*, 18 Stan. L. Rev. 1237, 1238-40 (1966); Comment, 41 N.Y.U. L. Rev. 622, 623 (1966).

It is crystal clear from text and context that § 106(a)(4) is exclusively addressed to judicial review. § 106 was added to the Act in September 1961, 75 Stat. 651, in order "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." H. Rep. 1086, 87th Cong., 1st Sess., 2 U.S.C. Cong. & Adm. News (1961) 2950, 2968. The section is entitled "Judicial Review of Orders of Deportation and Exclusion"; it expressly provides "the sole and exclusive procedure for, the judicial review of all final orders of deportation"; and subsection (a)(4) is a directive for court determination of a petition for judicial review filed under section 106.

§ 242(b)(4) is also addressed to judicial review. Its language is apt for that purpose only, since it speaks of the validity of an already-rendered decision of deportability. The language thus contrasts with that of section 349(c), added by 75 Stat. 656 (1961), 8 U.S.C. § 1481(c), which expressly provides that a party claiming loss of nationality must establish the claim "by a preponderance of the evidence."

The legislative history of § 242(b)(4) conclusively demonstrates that the section establishes a review standard only. The Senate Report on the bill which became the Immigration and Nationality Act states (S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 30):

"The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that of the administrative body."

The House Report (H. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 57, 2 U.S.C. Cong. & Adm. News (1952) 1653, 1712) contains substantially identical language, which is

quoted in Judge Friendly's opinion. It is inexplicable that the passage can be regarded as anything but a directive to an "appellate body."

Moreover, § 242(b)(4) refers merely to the quality of the evidence which may be considered to support deportability, and not to the degree of persuasion which the evidence on both sides engenders. This distinction was recognized by the Board of Immigration Appeals in *Matter of V*, 7 I & N Dec. 460, 463:

"Finally, it is important to bear in mind the distinction between the burden of proof and the quality of the evidence which is required to establish that burden successfully. It is to be noted that subsection (b)(4) of section 242 of the act does not speak of the burden of proof but of the quality of the evidence which the Service must produce before deportability can validly be found. Insofar as deportation of aliens is concerned, the act does not speak in specific terms of the burden of establishing deportability in the general case. That the burden of establishing alienage and establishing that a *prima facie* case of deportability is upon the Service is settled by judicial interpretation. . . ."

The language of § 242(b)(4), the intention manifested in the Senate and House Reports, and the administrative construction of the Board of Immigration Appeals, cannot be overcome by the fact that the section appears among provisions regulating proceedings before special inquiry officers and that it directs the Attorney General on the formulation of regulations. These circumstances may readily be attributed to the inept draftsmanship which characterizes the Act.³

³ The Act "is badly drafted, confusing and in some respects unworkable." *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization (1953) 263.

Judge Waterman stated (R. 88) that "even though Section 242 (b) appears in a section of the Act prescribing agency procedures, it is best understood as a restatement of the proper

D. The Service is required to prove the deportability of petitioner, a long-resident alien, by more than a preponderance of the evidence.

In the absence of statute, the standard of proof in civil proceedings has traditionally been judicially determined. Preponderance of the evidence is the usual civil standard, but more rigorous tests, including "clear and convincing" and "beyond a reasonable doubt," are frequently applied. McCormick, *Evidence* (1954) § 320; 9 Wigmore, *Evidence* (3d ed.) § 2498. Thus this Court requires satisfaction of the "clear, unequivocal and convincing" standard in denaturalization cases (*Schneiderman v. United States*; *Nowak v. United States*; *Chaunt v. United States*, all *supra*), expatriation cases (*Gonzales v. Landon*, 350 U.S. 920; *Nishikawa v. Dulles*, *supra*, at 131), and cases to cancel land patents (*United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381) and pension grants (*Lalone v. United States*, *supra*).

We submit that a higher standard than preponderance of the evidence, preferably the criminal standard, should be required in all deportation cases involving resident aliens who have been admitted into the country for permanent residence. We would not, as does Judge Waterman's opinion, restrict this rule to long-time resident aliens. However, if long residence is a condition, it is met here.

Schneiderman v. United States, *supra*, stated (at 125)

standard of judicial review and a reminder to the Board that final orders of deportation must be based on substantial evidence." It is also conceivable that the drafters of the Act intended by § 242(b)(4) to limit review by the Board of Immigration Appeals of decisions of special inquiry officers. If so, this intention was obviously a well-kept secret, at least from the Senate Committee, and also from the Board, which habitually makes its independent evaluation of the evidence, as it did here. Cf. the Board's opinion (R. 73-81) with that of the special inquiry officer (R. 66-72).

the rationale for requiring in denaturalization cases a higher standard of persuasion than preponderance of the evidence:

"This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted."

The same rationale applies to deportation cases against aliens who have been admitted for permanent residence. For such a case seeks to revoke the "once conferred," "precious" right of residency in this country. Unlike *Schneiderman*, the right here has been conferred by administrative, rather than judicial, action. But this makes no difference. *Schneiderman* (at 125) relied upon the *Maxwell Land-Grant Case*, *supra*, which applied the "clear, unequivocal and convincing" standard in a case seeking to cancel a land patent, and the *Schneiderman* rule was later applied to expatriation cases of persons who acquired their citizenship by birth rather than by naturalization. *Nishikawa v. Dulles*, *supra*.⁴

In *Rowoldt v. Perfetto*, 355 U.S. 115, and *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, the Court set aside deportation orders for insufficiency of the evidence. It is manifest from the facts of the cases that the Court subjected the records to a more rigorous requirement than preponderance of the evidence. The Court came close to articulating this fact when it referred in *Rowoldt* (at 120),

⁴ Moreover, "Naturalization has become more and more of an administrative proceeding, with the barest possible judicial camouflage." Roche, *Statutory Denaturalization: 1906-1951*, 13 U. Pittsburgh L. Rev. 276, 306.

Nor is the *Schneiderman* rule limited to fraud cases. In *Schneiderman* the government proceeded "not upon the charge of fraud, but upon the charge of illegal procurement" (at 122), and, of course, fraud is not an element of the grounds for expatriation.

to "the solidity of proof that is required for a judgment entailing the consequences of deportation."

There is ample reason, however, for requiring that the standard of proof in deportation cases involving resident aliens should be even higher, namely that which prevails in criminal cases — proof beyond a reasonable doubt. The Court has held that deportation is not "punishment" for constitutional purposes. *Harisiades v. Shaughnessy*, 342 U.S. 580. But realistically deportation of a resident alien is penal in three aspects — its consequences, its grounds, and its procedures.

Deportation is an interference with personal liberty in many respects more drastic than imprisonment. Because of the severity of the consequences, the Court has repeatedly characterized deportation as punishment. "That deportation is a penalty — at times a most serious one — cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391. "To banish them from home, family, and adopted country is punishment of the most drastic kind. . . ." *Lehmann v. United States*, 353 U.S. 685, 691 (concurring opinion). See also *Tan v. Phelan*, 333 U.S. 6, 10; *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521, 533 (dissenting opinion); *United States ex rel. Klonis v. Davis*, 13 F.2d 630 (2d Cir.); *United States ex rel. Mignozzi v. Day*, 31 F.2d 1019, 1021 (2d Cir.).

Because of "the grave nature of deportation," the Court has applied to deportation statutes the void-for-vagueness doctrine of criminal cases. *Jordan v. DeGeorge*, 341 U.S. 223, 231. And cf. *Petrowicz v. Holland*, 142 F.Supp. 369, 373 (E.D. Pa.).

Historically, banishment has been regarded as punishment. In the medieval codes, it ranked as a penalty second only to death. Navasky, *Deportation as Punishment*, 27 U. Kansas City L. Rev. 213, 226-27 (1959).

This case illustrates the cruel consequences of deportation of resident aliens. Petitioner entered this country as a child, and has had his home here for 46 years. His family, association and roots are here. His skills, his resources for survival, his ability to communicate in the only language he knows are all dependent on his continued residence here. As Judge Waterman's opinion points out, petitioner faces forcible expulsion to a land "which is in no meaningful sense his country now" (R. 92), and his banishment is "a penalty that surpasses in its enormity many imposed by the criminal law" (R. 91).

The section of the Immigration and Nationality Act which states the grounds of deportation (§ 241, 8 U.S.C. § 1251) reads like an unenlightened penal code. It includes conduct or associations considered to indicate moral turpitude or danger to the state. The claim that deportation is not punitive, but merely a regulatory measure to remove undesirable aliens, is belied by the facts that the causes for deportation include many which have no substantial relationship to undesirability, that they prescribe extreme imputations of guilt by association, and that because of the absence of a statute of limitations they include temporally remote conduct and association. As the President's Commission on Immigration and Naturalization reported, "Deportation may result from trivial offenses; for misbehavior many years after entry into the United States, without any limitation of time; and for wrongful conduct of the remote past, without any consideration as to whether there has been reformation or expiation." *Whom We Shall Welcome, supra*, at 202.

This case also illustrates the penal rather than regulatory nature of the statutory causes of deportation. There is no finding or evidence on petitioner's character or fitness to be a resident of this country. The charge against him arises from the alleged conduct of leaving the country to fight fascism in Spain. The charge was filed twenty-five years after the alleged illegal entry. This charge had been long ago barred by a one-time statute of limita-

tion, which was irrationally and retroactively repealed by the Immigration and Nationality Act (R. 84, fn.).

The section of the Act prescribing deportation procedures (§ 242, 8 U.S.C. § 1252) is like a code of criminal procedure. When a deportation charge is made, the alien may be arrested on administrative warrant. At the Attorney General's discretion, he may be held in custody or allowed bail during the deportation proceeding. His imprisonment or bail may continue for six months after issuance of a final order of deportation. Thereafter, until deportation is effected, the alien must periodically report to the immigration authorities; must submit "if necessary," to medical and psychiatric examination; must give under oath whatever information the Attorney General requires; and must conform to "such reasonable written restrictions on his conduct and activities" as the Attorney General prescribes. The regulations require that the alien be fingerprinted and photographed. 8 C.F.R. § 242.4.

*E. The evidence does not support a finding
of deportability under the correct
standard of proof.*

If we are correct as to the appropriate standard of proof, it follows that the judgment below must be reversed if only because the administrative agency applied an erroneous principle of law in reaching its decision. *SEC v. Chenery Corp.*, 318 U.S. 80; *SEC v. Chenery Corp.*, 332 U.S. 194.

We submit, however, that the proper course in this case is to order the deportation proceedings terminated rather than to remand for administrative redetermination. This is because the evidence clearly would not support a finding of deportability under either the "beyond a reasonable doubt" standard or the "clear, unequivocal and convincing" standard.

The case against petitioner depends on an uncertain, vague and belated identification by a witness testifying to

casual encounters of 27 years before in a manner inconsistent with his prior statement to a Service investigator. The witness himself admitted that he was not positive and only "felt" he saw petitioner in Spain. His testimony as to where and when he had seen petitioner was unspecific. He had not had any personal contact with petitioner. He could not identify petitioner when originally interviewed. In that interview he thought petitioner may have been with him on the ship leaving the United States, but in his testimony he denied any such recollection and placed petitioner aboard the ship returning to the United States. The witness could not identify the 1937 passport photograph. One must be incredulous of his eventual identification of a person whose appearance had inevitably changed in the intervening 27 years (see R. 46), especially when the identification was made only after the witness took a half hour, in the company of a Service investigator, to observe petitioner. See *supra*, pp. 4-5.

It has elsewhere been remarked of testimony which proposed to go back for twenty years, that the witness "would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection." *United States v. Chase*, 135 F. Supp. 230, 233 (E.D. Ill.). The case here is more extreme than in *Nowak v. United States*, 356 U.S. 660, in which, applying the "clear and convincing" rule for denaturalization, the Court observed (at 667):

"In addition, the record leaves us with the distinct impression that the testimony as to these episodes was itself quite uncertain, given as it was from 17 to 19 years after the event. Indeed, some of the testimony was elicited only after persistent prodding by counsel for the Government."

The Service's dream-like testimony in this case is not "reasonable, substantial and probative" evidence, nor does it produce the "solidity of proof" demanded by *Rowoldt*. In no event does it satisfy either the criminal standard of proof beyond a reasonable doubt or the standard requiring

that the evidence must be "clear, unequivocal and convincing" to a degree beyond "a bare preponderance of evidence which leaves the issue in doubt."

CONCLUSION

The judgment below should be reversed with directions that the deportation proceedings against petitioner be terminated.

Respectfully submitted,

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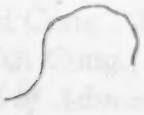
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In the Supreme Court of the United States

OCTOBER TERM, 1966

STATEMENTS

No. 80

JOSEPH SHERMAN, PETITIONER

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF

APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (R. 83-95), and the *per curiam* opinion of the court of appeals *en banc* (R. 96-97), are reported at 350 F. 2d 894.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1966. The petition for a writ of certiorari was filed on March 3, 1966, and granted on April 18, 1966 (R. 98; 384 U.S. 904). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a deportation proceeding against a long-time resident the administrative factfinders must

(1)

be persuaded beyond a reasonable doubt of the truth of the charges.

2. Whether the deportation order was supported by reasonable, substantial, and probative evidence on the record as a whole.

STATEMENT

Petitioner is a sixty-year-old alien. A native of Poland, he was admitted to the United States for permanent residence in 1920 (R. 65). In March 1963 petitioner was served with an order to show cause which charged that he had last entered the United States on December 20, 1938, without being inspected as an alien, and was consequently subject to deportation under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) (R. 1-3).¹

1. At hearings before a special inquiry officer, the government produced evidence showing that on June 8, 1937, petitioner had filled out and executed a United States Department of State "Passport Application Form For Native Citizens" in the name of Samuel Levine, stating that he intended to visit England and Poland and to depart that month (R. 5-8; Exhibit 6, Tab 9).² Samuel Rubinsky had

¹ Prior to 1952 a five-year statute of limitations applied to deportation for illegal entry. 39 Stat. 889. The 1952 Act eliminated all statutes of limitations. The fact that the prior law's statute of limitations would have prevented petitioner's deportation thereunder does not bar his deportation under the 1952 Act. *Lehman v. Carson*, 353 U.S. 685; Gordon and Rosenfield, *Immigration Law and Procedure* (1965 Rev.), § 4.6b. Petitioner does not dispute this.

² The exhibits introduced at the hearings are not in the printed record, but are filed with this Court as part of the certified administrative record. (1)

accompanied petitioner and signed the passport application as an identifying witness (R. 6, 10-11). At the hearing, Rubinsky identified a photograph attached to the application as one of petitioner as he had appeared in 1937 (R. 6, 8). Based on the application, a passport was issued in the name of Samuel Levine on June 10, 1937 (R. 11-12; Exhibit 7, Tab 10). The passport contained the same picture and description of petitioner—detailed to the point of showing a scar on the back of his right hand—as the application form (R. 11-13).

"Samuel Levine" used the passport to travel aboard the SS *Aquitania* from New York to France, arriving in France on June 22, 1937 (R. 13-15). The passport was presented for inspection by French officials on arrival in France and was endorsed by American consular officers in Barcelona, Spain, in December 1938 (R. 13-16). "Samuel Levine" returned to the United States aboard the SS *Ausonia*, on a voyage originating at Le Havre on December 10, 1938, and terminating at New York on December 20, 1938 (R. 12, 16-17). His destination upon entry was 403 Chester Street, Brooklyn, New York, the address of petitioner's parents.

Travel under the passport was shown by endorsements on the passport and other documentation. The passport itself contained a French visa issued at New York on June 15, 1937; an endorsement by French officials on debarking in June 1937; an endorsement on December 2, 1938, by the American Consul in Barcelona, Spain, "valid only for direct return to the

United States"; and an endorsement by the Immigration and Naturalization Service upon return to this country in December 1938 (Exhibit 7, Tab 10). Also included in the documentary evidence were the manifest for the SS *Aquitania* for arrival in France on June 22, 1937 (Exhibit 15, Tab 17); a State Department list of United States citizens believed to have traveled to Spain to join the Loyalist forces between January 1, 1937, and September 30, 1937 (Exhibit 16, Tab 18); a State Department cablegram of December 1938 showing endorsement of "Levine's" passport in Barcelona, Spain (Exhibit 17, Tab 19); a State Department cablegram dated December 10, 1938, listing Samuel Levine's departure on the SS *Ausonia* from France (Exhibit 18, Tab 20); the manifest of the SS *Ausonia* for its arrival in New York on December 20, 1938 (Exhibit 3, Tab 7); a certificate of the Immigration Service showing Samuel Levine's arrival on the SS *Ausonia* and his destination address (Exhibit 10, Tab 13); and Selective Service records showing petitioner's parents' address as 403 Chester Street, Brooklyn, New York (Exhibit 2, Tab 6).

Edward Morrow—an American citizen who has been employed as a reporter for the New York Times since 1943 (R. 22) and who went to Spain in 1937 to fight in the Spanish Civil War for the Loyalists*—testified that he recognized petitioner as the person he had known in Spain as Sam Levine in 1937 and 1938 (R. 17-20, 25-26, 30-38, 62). Morrow, like

* At the time, Morrow was known as Edward Mroczkowski. He had his name legally changed to Edward Morrow in 1941 (R. 20-21).

Samuel Levine, went to France on the SS *Aquitania* in June 1937, passed through Barcelona, Spain, late in 1938 for repatriation to the United States and returned to the United States on the SS *Ausonia*, arriving in New York on December 20, 1938 (R. 17, 19-20, 24, 20). Morrow and "Samuel Levine" were listed in a cablegram from the American Consul in Le Havre, France, dated December 10, 1938, as two of 145 volunteers from Spain who had sailed on the SS *Ausonia* (Exhibit 18, Tab 20). Morrow stated that he had seen petitioner "at least twenty times," and remembered petitioner as a driver in a transportation unit that had given combat support to the brigade in which Morrow had medical duties (R. 28, 30-38, 62). Morrow also recognized petitioner as having been on the SS *Ausonia* on the voyage that arrived at New York from France on about December 20, 1938 (R. 19, 30). The witness conceded that the possibility existed that he was mistaken in his identification of "Levine" some twenty-five years after the event, but stated that he did not believe he was (R. 61-63).⁴

Petitioner, claiming the privilege against self-incrimination and relying primarily on cross-examination of Morrow to cast doubt on his identification

⁴The Immigration Service first communicated with Morrow in April 1963. At that interview, Morrow stated that he could not identify two photographs of petitioner as "Mr. Sherman" but that "[i]n my mind the name Levine was somewhat like the type of fellow on this photograph" (R. 25, 54-56). Morrow later viewed petitioner for about a half hour and identified him as Levine (R. 60).

testimony, elected not to testify or introduce other evidence.

2. The special inquiry officer stated in his opinion that the "Government has established with a solidarity far greater than required that [petitioner] is the person who applied for and received the United States passport in evidence * * * and that with that document he had reentered the United States December 20, 1938, claiming to be a citizen of this country named Samuel Levine" (R. 70). He ordered petitioner deported to Poland (R. 72). The Board of Immigration Appeals dismissed the appeal, holding that the government had borne its "burden of establishing that [petitioner] is deportable as charged" (R. 74). The Board found that it was established beyond reasonable doubt that petitioner had applied for the passport, giving his true description, attaching his photograph to it and stating that he was going abroad (R. 78); and that the record made it a "most unlikely hypothesis" that it was anyone other than petitioner who had received and used the passport (R. 79).

On petition for review, a panel of the court of appeals, Judge Friendly dissenting, set aside the deportation order and remanded for further proceedings, holding that in cases involving long-time residents "the Government must prove beyond a reasonable doubt the facts upon which deportation depends" (R. 63, 92; 350 F. 2d at 899).^{*} On petition for rehearing, the court *en banc* sustained the deportation order for the reasons

^{*} The panel agreed that the scope of review of the findings of fact is limited to whether the findings are supported by reasonable, substantial and probative evidence on the record considered as a whole (R. 87-89, 93). It distinguished, however, between

stated in Judge Friendly's earlier dissenting opinion (R. 96; 350 F. 2d at 901; see R. 93-95).

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner is an alien, now sixty years old, who was admitted to the United States for permanent residence in 1920. In 1963 the Immigration Service commenced a proceeding to deport him, charging that in 1938, after a journey abroad, petitioner had returned to this country without being inspected as an alien. It is conceded that if he made the journey he is deportable as charged.* But at the administrative hearing he denied the allegation, thereby precipitating an extended inquiry into this factual question. The immigration authorities found that he had made the journey in question and ordered him deported. The court of appeals *en banc* (reversing the decision of the panel that had heard the appeal) sustained the administrative findings and order. The issues before this Court involve the proper standard for factfinding in deportation cases—more particularly those involving long-time residents of this country—and its application to the facts of this case.

judicial review of the sufficiency of the evidence and the degree of persuasion or belief required of the administrative factfinder (R. 87-89, 93). The panel found that Congress had never "adverted in any way to the problem of the degree of persuasion imposed upon the Government in deportation proceedings" (R. 89).

* See *Ben Huis v. Immigration and Naturalisation Service*, 349 F. 2d 1014, 1017 (C.A. 9); *United States ex rel. Volpe v. Smith*, 62 F. 2d 808 (C.A. 7), affirmed, 289 U.S. 422; *Saadi v. Carr*, 26 F. 2d 458 (C.A. 9), certiorari denied, 278 U.S. 616.

Factfinding in the context of the administrative process typically comes at two levels, and both are involved here. First, there is the administrative finding, in which the agency determines whether the party having the burden of proof has sustained it. The burden is carried if the agency is affirmatively persuaded by the evidence.

Superimposed upon the finding of the agency or other trier of facts is judicial review of the finding. Normally the question for the reviewing court is not what it would find in a *de novo* proceeding, but whether the finding of the trier of the facts is reasonable and supported by the record. Even where the trier of the facts is required (as in a criminal case) to be persuaded of the correctness of its finding beyond a reasonable doubt, the reviewing court need not decide whether it would have made the same finding. The reviewing function is ordinarily exhausted once the court has satisfied itself of the rationality of the finding in issue.

The distinction between the factfinding responsibilities of agency and reviewing court is fundamental to this case. The panel¹ was explicit that its only quarrel with the government was over the standard to guide the administrative factfinders (R. 93). While ruling

¹We refer to the panel of the court of appeals which initially heard petitioner's appeal and, in an opinion by Judge Waterman, Judge Friendly dissenting, set aside the deportation order. On rehearing, the court of appeals *en banc* reversed the panel and affirmed the Service on Judge Friendly's earlier dissenting opinion. Judges Waterman and Smith dissented from the *en banc* decision.

as a whole (R. 87-88, 93). It distinguished, however, between

that in the case of a long-time resident like petitioner the Attorney General must be persuaded of the factual grounds of deportability beyond a reasonable doubt, the panel reaffirmed the proposition that the standard of judicial review—as the Immigration and Nationality Act expressly provides—is whether the administrative factfindings are “supported by reasonable, substantial and probative evidence on the record considered as a whole” (Section 106(a)(4), 8 U.S.C. 1105a(a)(4)); and it did not suggest that, under this standard, the findings made by the Attorney General in this case were vulnerable.

This, we believe, is also the core of petitioner's attack in this Court upon the *en banc* decision of the court of appeals. As we understand his argument, petitioner recognizes that Section 106(a)(4) adopts the familiar “substantial evidence” standard of judicial review, and argues neither that the standard is constitutionally vulnerable as applied to deportation cases nor even that a higher standard is required in deportation cases involving long-time residents (see Pet. Br. 19, 12–14). His challenge is not to the standard which the courts employ in reviewing the evidentiary sufficiency of deportation orders but to the standard of persuasion by which the Attorney General is guided in the discharge of his fact-finding function.*

*To be sure, petitioner also challenges the substantiality of the evidence to support the order in this case, but that is consistent with an acceptance of the substantial-evidence standard.

Petitioner asks this Court, if it agrees that the Attorney General is required to be persuaded beyond a reasonable doubt (or by clear, unequivocal and convincing evidence) of the essential facts supporting deportability, to appraise the facts of the present case for itself, without remanding. This request is plainly misdirected. It is the trier of the facts, not the reviewing court, that under the view of the panel (and we assume of petitioner as well) must be persuaded of the truth of the charges against petitioner. The panel so recognized in ordering the case remanded for a re-determination of the facts by the Attorney General under the new standard of persuasion that it had prescribed. The question for the reviewing court is simply whether the administrative findings are supported by reasonable, substantial and probative evidence on the record as a whole. We show in Point II that they are. The heart of petitioner's case concerns the proper standard to guide the trier of the facts, and to that we devote Point I.

The administrative opinions in this case make clear that the Attorney General was solidly convinced, not doubtful, that petitioner had gone abroad under an assumed name in 1937. We submit that to require a higher standard of persuasion would be inconsistent with the legislative design. While it is true that the Immigration Act does not expressly advert to the degree of persuasion that the factfinder must have, it does provide that any deportation order must rest on "reasonable, substantial and probative evidence". This implies that the administrative factfinder must be reasonably persuaded on the basis of substantial and

probative evidence that the alien is in fact deportable. Any higher standard would appear excluded by the specific provision of the Act which makes the procedure there prescribed exclusive.

We stress that the Act establishes an *administrative* scheme of adjudication. It has never been thought appropriate to import into administrative proceedings the criminal standard of proof beyond a reasonable doubt or the fraud standard of clear and convincing proof. Such a result would be especially incongruous here since, as we show, the congressional purpose was actually to relax, for deportation cases, the procedural requirements of the Administrative Procedure Act. Moreover, it was well settled at the time that the relevant provisions of the Immigration Act were adopted that the Attorney General was not bound by the criminal or fraud standards. The supposition that Congress—in silence—meant to change the existing law is, in the circumstances, implausible.

Nor can resort properly be had here, as the panel thought, to the general authority of the courts to mold rules of evidence and procedure. Whatever special competence and responsibility the courts may have in prescribing such rules for judicial proceedings do not, we submit, extend to the fashioning of procedures for administrative hearings (except as may be required by due process), since in the administrative arena Congress has deliberately departed from the judicial model. As for deportation, moreover, Congress has specified the administrative procedures to be followed, and judicial prescription of a standard

of persuasion higher than that applied by the Service in this case would, as just suggested, distort the legislative design.

Finally, the standard urged by petitioner is not required by due process. The consequences of deportation are indeed grave. But where Congress has confided the factfinding function to an expert administrative agency, and the agency is satisfied upon substantial evidence in a fair hearing that the charges are true, the requirements of due process are satisfied. The criminal standard of proof is inapposite. It is designed for a jury of laymen—not for expert factfinders—and it reflects the special character of criminal sanctions. The clear-and-convincing standard is designed for cases where a right—like citizenship—already conferred is sought to be withdrawn, generally on the ground that it was fraudulently obtained. Nothing of that sort is involved here.

I

TO ORDER THE DEPORTATION OF A LONG-TIME RESIDENT, THE ATTORNEY GENERAL MUST BE REASONABLY PERSUADED, ON THE BASIS OF REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE, OF THE FACTUAL GROUNDS OF DEPORTABILITY. A HIGHER DEGREE OF PERSUASION IS NOT REQUIRED

At the outset, it is necessary to state precisely the question to be decided here. Petitioner says it is whether in a deportation proceeding against a long-time resident of this country the facts essential to de-

portability must be proved by more than a bare preponderance of the evidence (Pet. Br. 3). But this misconceives the standard actually applied by the Attorney General in cases of this character. Mindful of this Court's reference in *Rowoldt v. Perfetto*, 355 U.S. 115, 120, to "the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years," the Service's special inquiry officer found in this case that the government had "established with a solidarity far greater than required"* that petitioner in fact journeyed abroad in 1937-1938 and re-entered this country under an assumed name (R. 70); and the Board of Immigration Appeals, reviewing *de novo* the record made before the special inquiry officer, found it to be "most unlikely" that anyone other than petitioner had made the journey (R. 79). It is thus apparent that the Attorney General was firmly persuaded of the truth of the essential allegations against petitioner. We shall demonstrate that to impose a higher degree of persuasion would conflict with the design of the Immigration Act and is not required by the Constitution.

A. CONGRESS HAS NOT ADOPTED THE STANDARD URGED BY PETITIONER

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b)—the section that prescribes the procedure to be followed by the Attorney General in deportation cases—provides that "no decision of de-

* Although the statute is silent on the point, it is undisputed that the burden of proving deportability is on the government.

portability shall be valid unless it is based upon reasonable, substantial and probative evidence." The section further provides that "[t]he procedure so prescribed shall be the sole and exclusive procedure for determining" deportability. We agree that implicit in Section 242(b) is the requirement that before ordering deportation the Attorney General must be reasonably persuaded, by substantial evidence on the whole record, that the charge of deportability is true. Cf. *Morgan v. United States*, 298 U.S. 468, 481. Certainly an individual may not be ordered deported where, although the charge of deportability is supported by reasonable, substantial and probative evidence, on balance the administrative factfinders conclude that the evidence supporting the alien is more persuasive. But while the statute in our view requires that the administrative factfindings be based upon a reasonable conviction of their veracity, we submit that the statutory language, viewed in context, implies not adoption but rejection of the criminal standard of proof beyond a reasonable doubt or the fraud standard of clear and convincing proof.

Before Section 242(b) was enacted, the immigration laws contained no detailed provisions governing hearings in deportation cases, but made clear that the facts supporting deportability were to be determined by the Attorney General, not the courts. See, e.g., *Kessler v. Strecker*, 307 U.S. 22, 34. In 1950, this Court held the provisions of the Administrative Procedure Act applicable to deportation proceedings. *Wong Yang Sung v. McGrath*, 339 U.S. 33. Congress responded by expressly exempting such proceedings

from certain requirements of the Administrative Procedure Act; it then established, in 1952 (see Section 242(b)), a self-contained and exclusive procedural system for the deportation field (*Marcello v. Bonds*, 349 U.S. 302).¹⁰

That statute provides for a hearing before a "special inquiry officer", who is an employee of the Immigration Service. The procedures are less rigorous than under the Administrative Procedure Act, but they were modeled on that Act (*Marcello*, at p. 309) and incorporate its essential features. Thus, there must be notice to the alien and an opportunity for him to be heard; the special inquiry officer is not to have participated in the investigation or prosecution of the case; and his decision of deportability must, as noted, be based upon "reasonable, substantial and probative evidence."¹¹ The regulations of the Attorney General establish a Board of Immigration Appeals which bears much the same relationship to the special inquiry officers as administrative agencies bear to their hearing examiners.¹²

Having thus adopted the administrative model of factfinding and having declined to "judicialize" it, even to the extent provided in the Administrative Procedure Act, Congress can hardly be thought—in silence—to have adopted for deportation proceedings

¹⁰ See S. Rep. No. 1137, 82d Cong., 2d Sess., p. 28; H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 55-56.

¹¹ The Administrative Procedure Act contains an almost identical provision. Section 7(c), 5 U.S.C. 1006(c), now codified as 5 U.S.C. 556(d).

¹² The Board has full power to redetermine factual issues. Gordon and Rosenfield, *Immigration Law and Procedure* (1966 Rev.), § 1.10e; cf. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474.

the stringent criminal or fraud standards of persuasion. These standards are foreign to administrative proceedings and far stricter than anything known to administrative law. It has never been suggested that either standard is imposed on federal administrative proceedings generally by the Administrative Procedure Act. *A fortiori* neither is applicable to deportation proceedings. Congress in the deportation area was unwilling even to adopt the full panoply of procedural requirements provided by the Administrative Procedure Act. Surely, then, it did not assent to the imposition of standards even higher than those prescribed by that Act.¹³

Furthermore, at the time that Section 242(b) was enacted, it was already well established that the criminal standard of proof was not applicable in the deportation field.¹⁴ There is no basis to suppose that Congress meant to unsettle this understanding. Indeed, until the present case it was assumed without

¹³ We point out that Section 349(c) of the Immigration Act, 8 U.S.C. 1481(c), provides that, whenever loss of United States nationality is put in issue, such loss must be established "by a preponderance of the evidence". This provision was enacted to reduce the government's burden from the "clear, convincing and unequivocal" standard that had been applied by this Court in *Nishikawa v. Dulles*, 356 U.S. 129, and *Gonzales v. Landon*, 350 U.S. 920 (see p. 19, n. 16, *infra*). H. Rep. No. 1086, 87th Cong., 1st Sess., pp. 40-41. Thus, in a deportation proceeding against one whose prior United States citizenship is undisputed, the government is required to prove that he performed the expatriating act only by a preponderance of the evidence. It is unlikely that Congress intended to exact a higher degree of proof where the subject of the deportation proceeding is admittedly an alien.

¹⁴ See *United States v. Spector*, 343 U.S. 169, 178-179 (dissenting opinion); *Bridges v. Wixon*, 144 F. 2d 927, 932-933 (C.A. 9), reversed on other grounds, 326 U.S. 135; *In re*

question that Section 242(b), in requiring that deportation orders be predicated upon reasonable, substantial and probative evidence, adopted the administrative, not the fraud or criminal, standard of persuasion. Gordon and Rosenfield, *Immigration Law and Procedure* (1959), § 8.12c; Note, *Immigration and Nationality*, 66 Harv. L. Rev. 643, 698 (1953). Congress should be heard before that assumption is overturned.

It is no answer to say, as the panel below did, that the courts have inherent authority to fashion appropriate rules of evidence and trial procedure. We submit that the exercise of that authority in the present context is precluded by the congressional determination to confide decision of the facts in deportation cases to an administrative body, not a court. Congress has deliberately rejected judicial procedures for the trial of such cases, and in the fashioning of appropriate *administrative* procedures the courts do not claim particular expertise or authority.¹⁸ Moreover, a judicial rule that conflicts with the legislative *Giacobbi*, 32 F. Supp. 508, 517 (S.D. N.Y.), affirmed, 111 F. 2d 297 (C.A. 2).

¹⁸ Cf. *Morgan v. United States*, 304 U.S. 1, 18; *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 359; *Florida v. United States*, 282 U.S. 194, 215; see, generally, Davis, *Administrative Law Treatise* (1958), § 14.01; chs. 29, 30; Jaffe, *Judicial Control of Administrative Action* (1965), chs. 9, 14, 15. The panel stated that the "realm of evidence law is one in which courts are especially expert" (R. 90). But the judicial rules of evidence are, of course, inapplicable to administrative proceedings. Gordon and Rosenfield, *supra*, § 5.10a; see, also, *Bridges v. Wixon*, 326 U.S. 135, 152-156, 175-176; *Yiannopoulos v. Robinson*, 247 F. 2d 655, 657-659 (C.A. 7); Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c), now codified as 5 U.S.C. 556(d).

scheme to which it applies cannot stand unless constitutionally required (a matter we consider next). The rule prescribed by the panel in this case is, as we have seen, opposed to the congressional objectives in establishing an administrative system for the trial of deportation cases.

B. THE STANDARD APPLIED IN THIS CASE SATISFIES THE REQUIREMENTS OF DUE PROCESS

As pointed out earlier, both the special inquiry officer and the Board of Immigration Appeals expressed their conviction as to the truth of the essential allegation against petitioner—that he had re-entered this country in 1938 under an assumed name. The constitutional question, therefore, is whether the precepts of fair procedure embodied in the Due Process Clause of the Fifth Amendment permit a deportation order against a long-time resident to be predicated upon a reasonably entertained conviction of the administrative factfinders—based upon substantial evidence on the record of a proceeding otherwise admittedly consistent with the requirements of due process—that the alien is in fact deportable, or whether the factfinders must insist upon clear, unequivocal and convincing proof or proof beyond a reasonable doubt.

Deportation is a grave consequence, especially when visited upon an elderly individual who has spent most of his life in this country. Fairness requires, therefore, that the underlying factfindings rest upon a substantial foundation. We believe that the procedures of the Attorney General as applied in this case minimized the risk of error. The hearing was before an

expert factfinder, the special inquiry officer. The alien was accorded the full rights of the adversary process to defend himself against the government's charges. In finding against petitioner, the special inquiry officer carefully analyzed the evidence, and on the basis of his analysis declared himself persuaded that the charges had been proved. The Board of Immigration Appeals—a panel of expert factfinders—reviewed the evidence *de novo* on the record compiled before the special inquiry officer and unanimously pronounced itself likewise persuaded of the truth of the charges. Its decision was reviewable by the Attorney General, the court of appeals, and this Court.

We believe that the procedure in its totality was fair. The risk of an error adversely affecting petitioner was reduced to a minimum. Imposing upon the trier of the facts a higher degree of persuasion than was articulated by the administrative factfinders in this case is not, we submit, constitutionally required in order to guarantee fair and accurate factfinding.

Higher degrees of persuasion have been thought appropriate only in extraordinary circumstances readily distinguishable from those here. This Court has held that the standard of clear, unequivocal and convincing evidence applies in denaturalization and expatriation cases.¹⁸ Those are cases where the government seeks

¹⁸ *Chaunt v. United States*, 364 U.S. 350; *Nowak v. United States*, 356 U.S. 660; *Nishikawa v. Dulles*, 356 U.S. 129, 135; *Maisenberg v. United States*, 356 U.S. 670; *Gonzales v. Landon*, 350 U.S. 920 (*per curiam*); *Baumgartner v. United States*, 322 U.S. 665; *Schneiderman v. United States*, 320 U.S. 118, 125, 158.

to withdraw rights of citizenship previously conferred. The Court has merely applied the settled principle of equity that vested rights can be cancelled, as fraudulently or otherwise improperly obtained, only upon an extraordinarily clear showing.¹⁷ A principle thus designed to assure reasonable stability and finality for transactions upon which great reliance is normally placed is inapposite here. As an alien, petitioner knew that his status in this country was far more uncertain than that of a citizen, and yet he has remained for 46 years in this country without obtaining citizenship.

The criminal standard of proof beyond a reasonable doubt is likewise inapposite. The extraordinary degree of persuasion it requires reflects in part the nature of the jury as a factfinding instrument. The jury is a lay body. It traditionally does not articulate the reasoning upon which it bases its findings, and judicial review is accordingly very limited. These considerations indicate the appropriateness of insisting upon the jurors' near certainty (as well as unanimity) in criminal matters. In addition, criminal condemnation has historically been regarded as the most serious measure that society can invoke against its members, and the greatest precautions are therefore taken to ensure that errors against the defendant are not made.

Deportation hearings cannot be likened to criminal proceedings before a jury. The factfinders in deportation proceedings are experts, not laymen, and

¹⁷ *E.g.*, *Lalone v. United States*, 164 U.S. 255; *Maxwell Land-Grant Case*, 121 U.S. 325.

they analyze their findings and supporting reasoning in written opinions which afford a ready basis for judicial review."¹⁸ Furthermore, while deportation is a grave consequence, it does not carry the same stigma as criminal conviction. As this Court has repeatedly held, it is not a penal sanction¹⁹. The considerations that justify requiring an extraordinary degree of persuasion in criminal cases are thus absent.

We advert to a further consideration—the grave difficulties entailed by a judicial rule which singles out a particular class of aliens ("long-time" residents in this case) for special protection. Arbitrariness would seem inherent in any effort to define "long time" in this context. The judgment required to thus distinguish classes of aliens is properly legislative rather than judicial. Congress has recognized this and has provided a growing variety of forms of relief

¹⁸ The special inquiry officer is required by regulation to render a decision that shall include "a discussion of the evidence and findings as to deportability." 8 C.F.R. 242.18(a).

¹⁹ *Galvan v. Press*, 347 U.S. 522; *Carlson v. Landon*, 342 U.S. 521, 537-538; *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-595; *Mahler v. Eby*, 264 U.S. 32, 39; *Bilokumsky v. Tod*, 263 U.S. 149, 154; *Bugajewitz v. Adams*, 228 U.S. 585; *Fong Yue Ting v. United States*, 149 U.S. 698, 730; see, generally, Gordon and Rosenfield, *supra*, §§ 4.1c, 5.1. Whether a statute is punitive depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or incident to some broader regulatory objective. *Kennedy v. Mendoza-Martinez*, 372 U.S. 114, 208-209 (dissenting opinion); *Flemming v. Nestor*, 363 U.S. 603, 613-617; *Trop v. Dulles*, 356 U.S. 86, 107-109; *United States v. Lovett*, 328 U.S. 303, 308-312. It is clear that the provision requiring inspection of aliens upon entry to the United States is regulatory in its objective. For a comprehensive enumeration of the elements of punishment, see *Kennedy v. Mendoza-Martinez*, *supra*, 372 U.S. at 168-169.

from deportation for long-time residents (see 8 U.S.C. 1254, 1255, 1259).” We do not disagree that the Attorney General, in weighing conflicting evidence in a deportation case, should bear in mind the hardship that an order of deportation may work in the particular case. The Attorney General did so here. The opinions in this case disclose, we believe, careful consideration of the evidence as well as a settled conviction on the basis of substantial evidence of the truth of the charges against petitioner. But we submit that any further amelioration of the hardships of deporting long-time residents is for Congress to provide.

II

UPON JUDICIAL REVIEW, THE ADMINISTRATIVE FACTFINDINGS IN A DEPORTATION CASE ARE FINAL IF SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD; THE STANDARD WAS SATISFIED HERE

We turn now to the second question in this case—whether the court of appeals *en banc* correctly concluded that the administrative findings were supported by reasonable, substantial and probative evidence on the record considered as a whole. We begin with a brief discussion of the proper standard of judicial review of administrative factfindings in deportation cases.

A. THE STANDARD OF JUDICIAL REVIEW

Until recently, there was no specific statutory provision for judicial review of deportation orders, and the only review was by habeas corpus. In the early cases the courts declined to review the sufficiency

²⁰ Petitioner did not seek any such relief.

of the evidence in immigration cases at all; this Court stated that "no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which [the immigration officer] acted." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660. Later, the principle was established that deportation on "charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*"; but, to uphold a deportation order, it was sufficient, in the words of Justice Stone, "that there was some evidence from which the conclusion of the administrative tribunal could be deduced" (*Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106; see, also, *Tisi v. Tod*, 264 U.S. 131, 133-134).²¹ Some courts, however, stated the standard of review as whether the administrative order was supported by "substantial evidence",²² an approach stimulated by the enactment in 1946 of Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(e), now codified as 5 U.S.C. 706, which provided that the findings of administrative agencies subject to the Act must be set aside if "unsupported by substantial evidence." When in 1950 this Court held the Administrative Pro-

²¹ For similar formulations, see *Bridges v. Wixon*, 326 U.S. 135, 149, 167, 170-171, 178 (some evidence); *Kessler v. Strecker*, 307 U.S. 22, 34 (if there was evidence); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 829, 334-336 (whether there was any evidence); *Costanzo v. Tillinghast*, 287 U.S. 341, 342-343 (any evidence); *Bilokumsky v. Tod*, 263 U.S. 149, 153 (unsupported by evidence); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (not supported by evidence).

²² *Whitfield v. Hanges*, 222 Fed. 745, 749, 751 (C.A. 8); *Gambroulis v. Nash*, 12 F. 2d 49, 52 (C.A. 8); *Mita v. Bonham*, 25 F. 2d 11, 12 (C.A. 9).

cedure Act applicable to deportation cases (p. 14, *supra*), the stage was set for the enactment of Section 242(b) of the Immigration and Nationality Act of 1952—the first statute expressly to introduce the substantial-evidence standard into the immigration area.

Section 242(b) established, as observed earlier, a comprehensive administrative procedure for deportation cases modeled on the Administrative Procedure Act (see p. 15, *supra*). One of the provisions of Section 242(b) is that the regulations to be prescribed by the Attorney General for conducting proceedings before the special inquiry officer shall include the requirements that “no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence,” and that “[t]he procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.” The Committee reports explain what is meant by “reasonable, substantial, and probative evidence” (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 30; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 57):

The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below.

This definition tracks closely the Court’s definition in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, of the standard for judicial review of administrative

factfindings.²³ Hence—although the language of the committee reports, as well as the location of the provision in the section devoted to the procedure before the Attorney General, indicates that it was primarily directed to the Attorney General rather than to the reviewing courts (see pp. 13–15 *supra*)—the courts treated the provision as also establishing the standard for judicial review. Thus, they consistently held that once the findings underlying a deportation order were shown to be supported by reasonable, substantial and probative evidence, their inquiry was at an end.²⁴

Following this Court's 1955 decision in *Shaughnessy v. Pedreiro*, 349 U.S. 48, which made available additional forms of judicial review of deportation orders under the Administrative Procedure Act, executive and legislative attention focused on the desirability of creating a single statutory review procedure. The culmination was the enactment in 1961 of Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a). Section 106(a)(4)—the first express statutory standard of judicial review—provides that:

the petition [for review] shall be determined solely upon the administrative record upon

²³ The Court said that substantial evidence is "more than a mere scintilla"—more than evidence that does no "more than create a suspicion of the existence of the fact to be established." *Id.* at 477. It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ibid.*

²⁴ See, e.g., *Rowoldt v. Perfetto*, 355 U.S. 115, 120–121; *Langhammer v. Hamilton*, 295 F. 2d 642, 644–645 (C.A. 1); *Lattig v. Pilliod*, 289 F. 2d 478, 479 (C.A. 7); *Estrada-Ojeda v. Del Guercio*, 252 F. 2d 904, 905 (C.A. 9); *Yiannopoulos v. Robinson*, 247 F. 2d 655 (C.A. 7); *Ocon v. Del Guercio*, 237 F. 2d 177, 180 (C.A. 9); *United States ex rel. Brzovich v. Holton*, 222 F. 2d 840, 842–844 (C.A. 7).

which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."²²

In proceedings under Section 106(a)(4), as before, the courts have considered their inquiry completed upon determining that the administrative findings are supported by reasonable, substantial and probative evidence on the record as a whole."²³

Thus Congress has manifested its intention of confining judicial review of deportation orders within the limits that characterize judicial review of other administrative action."²⁴ This means that the review-

²² This language originated in a bill drafted in the Department of Justice. Accompanying the draft was a letter from the Attorney General explaining that the provision for judicial review was "essentially the evidentiary standard contained in Section 10(e) of the National Labor Relations Act, as amended." National Archives, Doc. 2215, S. 3169, 84th Cong.; see *Pianopoulos v. Robinson*, 247 F. 2d 655, 658 (C.A. 7).

²³ See e.g., *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 477, n. 6, 483-484, 486 (majority and dissenting opinions); *D'Andrea v. Immigration and Naturalization Service*, 335 F. 2d 377, 378 (C.A. 6), certiorari denied, 379 U.S. 999; *United States v. Diego*, 320 F. 2d 898, 909, n. 9 (C.A. 2); *Greene v. Immigration and Naturalization Service*, 313 F. 2d 148, 151 (C.A. 9), certiorari denied, 374 U.S. 828; *Ramasauskas v. Flagg*, 309 F. 2d 290, 293 (C.A. 7); *Scythes v. Webb*, 307 F. 2d 905, 907 (C.A. 7); *Lopez-Blanco v. Immigration and Naturalization Service*, 302 F. 2d 553, 554-555 (C.A. 7).

²⁴ "We do not understand petitioner to challenge this proposition or to question the constitutional validity of the congressional determination. Reverting for a moment to Point I of our argument—the degree of persuasion the administrative factfinder in deportation cases must feel—we note the inconsistency in importing the criminal standard of persuasion in an area where Congress has so emphatically indicated that the processes of administrative law are to be applied."

ing court "is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole," by the courts of appeals (*Universal Camera, supra*, 340 U.S. at 490) and that agency findings of fact are entitled to "due deference" so long as there is substantial evidence to be found in the whole record (*Labor Board v. Brown Food Store*, 380 U.S. 278, 291-292). It means, too, that evidence that a reasonable mind might accept as adequate to support a conclusion may be "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620; see *Universal Camera Corp.*, at p. 488. As Professor Jaffe has summed up (*Judicial Control of Administrative Action* (1965), p. 602):

Once [the judge] has determined that there is a reasoned probability of the fact found by the agency he is *functus officio*. It matters not that the whole record would support a contrary inference or that in the opinion of the court the contrary inference is more probable or even much more probable.

As next we show, this standard was met here.

B. THE SUBSTANTIALITY OF THE EVIDENCE

The evidence conclusively established that in June 1937 petitioner applied for a United States passport in the name of "Samuel Levine"; petitioner does not deny this. The application recited his intention to

depart, that month, for a family visit to England and Poland, and petitioner concedes that "[i]t was established that someone traveled to Europe on this passport in June 1937, aboard the SS *Acquitania*, and that someone entered the United States on this passport on December 20, 1938, aboard the SS *Ausonia*" (Pet. Br. 4). The remaining question confronting the administrative factfinders was whether petitioner was that "someone." All were convinced by the evidence that he was. The special inquiry officer found this conclusion "established with a solidarity far greater than required" (R. 70), and the Board stated, "We believe the record makes it a most unlikely hypothesis that it was one other than the [petitioner] who received and used the passport" (R. 79).

The passport itself was persuasive evidence that it was petitioner who used it. As the Board noted (R. 78), when petitioner applied for the passport he gave his true description, attached his photograph, and stated that he was going abroad. The passport itself (Exhibit 7, Tab 10) contains petitioner's description (detailed to the point of reciting a scar on the back of his right hand), his photograph, various visa and immigration endorsements indicating that the bearer had been seen and passed by foreign consular and immigration officials, and an extension endorsement by the American Consul at Barcelona dated December 2, 1938. It is more than a reasonable inference that the bearer of the passport would not have passed through immigration inspection and consular scrutiny on several occasions unless he was the person whose photograph and physical description appeared in the docu-

ment. The inference was amply corroborated by the eyewitness testimony of Mr. Morrow.

There was no reason why Morrow's uncontradicted testimony should not have been believed. As an experienced reporter for a distinguished newspaper, he could be expected to have more than ordinary facility in recalling and describing events and persons from out of the past. A cautious witness who refused to commit himself in identifying petitioner from a photograph, and who made no concrete identification until he had assured himself by personal observation of petitioner (R. 25, 54-56, 60), Morrow chose his words carefully to disclose the precise extent of his recollection. He had been in a good position to observe the events he testified to, his foreign itinerary having so closely paralleled that of "Samuel Levine", and no reason appears why he should have fabricated or exaggerated. The special inquiry officer—who observed him as a witness and was thus best situated to appraise his credibility—found him to be credible and reliable, a conclusion shared by the Board (R. 77).

The Board drew no unfavorable inference from petitioner's failure to testify, since it was based on a claim of privilege under the Fifth Amendment. But petitioner—without testifying—could readily have produced evidence establishing that he was in the United States during the crucial 1937-1938 period if such were the fact. Petitioner's whereabouts during that seventeen-months period was a matter peculiarly within his knowledge. It could have been proved by employment records, public relief records, public utility records (to name but a few possibilities), or by the

testimony of a witness who had seen him. His failure to adduce any evidence on this issue—in the face of the government's direct evidence—supports the inference that he was abroad.”

We submit the evidence—the passport, which petitioner admittedly obtained and which admittedly was used by someone for travel to Spain; Morrow's eyewitness testimony; the absence of any evidence that petitioner was in the country in the relevant period, evidence readily producible if petitioner had not been abroad—was indeed adequate, and that the court of appeals *en banc* properly understood and applied the statutory standard of judicial review when it could “perceive no proper basis under the statutory standard for reversing the order here under review * * *” (R. 95). This Court will disturb the court of appeals' appraisal of the substantiality of the evidence in support of administrative findings only in the “rare instance when the standard appears to have been misapprehended or grossly misapplied” (*Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 491). There is accordingly no basis for a reversal here.

²² See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-226; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 111-112; *Bilokumsky v. Tod*, 263 U.S. 149, 153-154.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1966.

reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in the absence of the alien.

Section 241 of the Immigration and Nationality Act, 66 Stat. 204, 8 U.S.C. 1251, provides in pertinent part:

(a) **General classes.** Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States

Section 242(b) of the Act, 66 Stat. 208, 209-210, 8 U.S.C. 1252(b), provides in pertinent part:

(b) **Proceedings to determine deportability.**

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a

reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

- (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
- (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;
- (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. * * *

Section 106(a) of the Act, as amended, 75 Stat. 651-652, 8 U.S.C. 1105a (a), provides in pertinent part:

Section 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

* * *

(4) * * * the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive * * *.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

NO. 80

JOSEPH SHERMAN, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE AND BRIEF OF
AMICI CURIAE IN SUPPORT OF THE
DISSENTING JUDGES BELOW**

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Amici Curiae

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**MOTION FOR LEAVE TO FILE BRIEF OF
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The undersigned hereby move for leave to file the attached brief in support of the dissenting judges below.

INTEREST OF AMICI CURIAE

Our interest in this case relates to law reform. We represent no clients. Regarding law reform and its relevance to this case, we have individually and, on occasion, together concerned ourselves with matters such as (1) judicially prescribed rules of fairness for administrative proceedings, (2) relations between courts and legislatures concerning law reform, (3) erosion of

the goals of the Administrative Procedure Act by those who ignore its plain words, (4) special problems of the long-time resident alien, and (5) the role of legal educators as amici curiae. See, e.g., Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961), and *What Agencies Are Exempt from the Administrative Procedure Act?*, 36 NOTRE DAME LAWYER 320 (1961); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J. 262 (1959), and *Review of Pocket Parts to Davis Administrative Law Treatise*, 54 CALIF. L. REV. 1392, 1405-1411 (1966); Newman and Surrey, *ON LEGISLATION* (1955) (particularly chap. 4: "Legislative-Administrative Relations").

Our study of this case has convinced us that certain questions have not been and will not adequately be presented by the parties; yet the answers to those questions could be dispositive of the issues here. For example, there appears to have been no reference by any participant attorney to §10(e) of the Administrative Procedure Act, 5 U.S.C. §1009(e), which clearly governs the scope of review here of all questions of law. Nor has §7(c) of that Act been mentioned, notwithstanding its demonstrable relevance to the interpretation of those words of the Immigration and Nationality Act that the parties' attorneys here have discussed. Nor has there been adequate exploration of due process questions that inevitably arise when the liberty of long-time residents is jeopardized. We believe that such questions are critically important and that, before reaching its decision, the Court should consider their impact.

IS THIS MOTION TIMELY PRESENTED?

We had expected to file this brief pursuant to Rule 42(2), "within the time allowed for the filing of the brief of the party supported." To our great shock we learned last month, however, while telephoning the Office of the Solicitor General, that the brief of the party our position supports already had been filed. That was surprising because on August 9, 1966, Mr. Gollobin, attorney for Petitioner, wrote to Mr. Hesse as follows: "The filing date for our brief on Sherman is on or about October

25th which I think will give you time for an amicus brief. Copy of cert petition is enclosed." Thus we erroneously had assumed that our deadline would be the last week in October rather than the last week in September.

Rule 42(3) requires only that our brief "timely be presented," and we hope that the explanation of our inability to proceed under Rule 42(2) will be considered sufficient. We airmailed typescript copies of the brief to the Solicitor General and to Petitioner's attorneys on the same day that our manuscript was given to the printer. Consent to its filing was obtained from Petitioner's counsel; consent of the Solicitor General was requested but refused.

. . .

Accordingly we request leave to file the attached brief.

October 11, 1966.

Respectfully submitted,

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Supreme Court of the United States

**BRIEF OF AMICI CURIAE IN SUPPORT
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The nature of the interest of amici curiae is stated in the attached motion (see page 3 above), and is incorporated herein.

SUMMARY OF ARGUMENT

I.

This case involves not only §106(a) and §242(b) of the Immigration and Nationality Act, which are discussed in Petitioner's Brief and in the Solicitor General's Brief in Opposition, but also §10(e) and §7(c) of the Administrative Procedure Act, which have not been discussed here or below.

II.

Under §10(e) of the Administrative Procedure Act one question to be decided is the exact meaning of that "burden of proving" which the Solicitor General has conceded was properly on the Government. Burden of proof must not be confused with quantum of proof; and in the Immigration and Nationality Act there is no prescription concerning burden, though Congress did prescribe concerning quantum.

III.

To require more than a preponderance of evidence in this kind of case would not introduce confusion and uncertainty into deportation law. "This kind of case" can be defined, and immigration officials have had long experience in applying variant burdens of proof. In this case the deciding officials may well have been confused about what burden of proof means.

IV.

There are compelling reasons why more than a preponderance of evidence should be required. Since petitioner received no such protection the agency's findings, under §10(e) of the Administrative Procedure Act, must be set aside because they are "without observance of procedure required by law."

V.

Section 10(e)(B)(1) of the Administrative Procedure Act requires that the agency action be set aside because it was arbitrary, capricious, and an abuse of discretion.

ARGUMENT

I. This case involves §10(e) and §7(c) of the Administrative Procedure Act, which have not yet been discussed either here or below.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, applies here except for subdivisions (5) and (6) of paragraph (e).¹ See §12 of the Act, 5 U.S.C. §1011. In pertinent part §10 reads as follows:

¹ Subdivision (6) affects only trials de novo. Subdivision (5), requiring courts to set aside "findings . . . unsupported by substantial evidence," is supplanted here by §106(a)(4) of the Immigration and Nationality Act, which requires that supporting evidence be not only "substantial" but also "reasonable . . . and probative."

Section 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

...
 (e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

It is clear that no "statutes preclude judicial review" and that expulsion of aliens is not "committed to agency discretion" within the meaning of the introductory clause of that section. Indeed, though §106 of the Immigration and Nationality Act *first*, prescribed the form of action for review, and *second*, modified APA §10 in other ways (e.g., by requiring "reasonable . . . and probative" as well as "substantial" evidence), it is clear that Congress did not intend to supersede the bulk of §10(e). See H.R. REP. 1086, p. 22 (1961) ("the bill implements and applies section 10 of the Administrative Procedure Act"). The

first sentence of §106 states that the Review Act of 1950, 5 U.S.C. §§1031-1042, is "the sole and exclusive procedure for . . . judicial review of all final orders of deportation. . . ." Other agencies subject to the Review Act are, of course, also subject to §10(e) of the Administrative Procedure Act.

These words of §7(c) of the Administrative Procedure Act, 5 U.S.C. §1006(c), are significant because they illumine §106 (a)(4) and §242(b)(4) of the Immigration and Nationality Act (see II,B below):

Except as statutes otherwise provide, the proponent of a rule or order shall have the *burden of proof*. Any oral or documentary evidence ~~may~~ be received, but . . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record . . . and as supported by and in accordance with the *reliable, probative, and substantial* evidence.—5 U.S.C. §1006(c) (*italics added*).

II. Under APA §10(e) one question to be decided is the exact meaning of that "burden of proving" which the Solicitor General has conceded was properly on the Government. (Brief in Opposition to Petition for Certiorari, p. 6, n. 5)

A. *Burden of proof is not quantum of proof.*

We respectfully submit that the Solicitor General has muddled, analytically, the concept *quantum of proof* and the concept *burden of proof*. Cf. *id.* p. 5, where he equates "quantum of proof" and "standard of proof."² When in accordance with the Immigration and Nationality Act a court of appeal, under §106, or the Board of Immigration Appeals, or the special inquiry officer, under §242, looks for "reasonable, substantial,

² This muddling of two concepts, which also characterizes Judge Friendly's opinion below, is supported by neither of the leading treatises. See Davis, ADMINISTRATIVE LAW TREATISE §§14.14, 29.02, and 29.06 (1958); Gordon and Rosenfield, IMMIGRATION LAW AND PROCEDURE §§5.9h, 5.10b, 8.12c (1959-66).

It should be noted also that this case does not deal with the mere burden of producing evidence; *i.e.*, "the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." New CALIFORNIA EVIDENCE CODE §110 (1965).

and probative evidence," the search is for evidence by which the "findings of fact . . . [are] supported" (§106) or on which the "decision of deportability . . . is based" (§242). The question whether findings are supported by adequate evidence and the question whether a decision is based on adequate evidence are both different from the question whether the trier of fact, when he weighed the evidence, applied the correct burden of proof.

Burden of proof deals with belief. It means the obligation "to establish by evidence a requisite *degree of belief* concerning a fact, in the mind of the trier of fact"; moreover, "burden of proof may require a party to . . . establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, . . . by proof beyond a reasonable doubt . . . [or] some other burden. . . ." ³ That is to say, the key phrases are "preponderance," "clear and convincing," "beyond a reasonable doubt," and the like. Phrases such as "reliable, substantial, and probative" belong in another frame of discourse; they are akin to quantum and quality, not to burden or belief. The following excerpt from *Chow Sing v. Brownell*, 235 F.2d 602, 604 (9th Cir. 1956), is instructive:

Appellant's argument is based on a misconception of the meaning of proof by a preponderance of the evidence . . . as distinguished from proof by clear and convincing evidence or proof beyond a reasonable doubt. Despite the terms used to describe two of these standards, the burden of proof is not simply a matter of the *quantity or type* of evidence offered. More significant is the *degree of belief* required of the trier of fact to make a finding.

When the District Judge stated that he was unable to determine from the evidence whether appellant was the child of the citizen alleged to be his father, he was not applying the "clear and convincing evi-

³ Quoted from §115 and the accompanying legislative committee comment on the new CALIFORNIA EVIDENCE CODE (1965) (*italics and first comma added*).

dence" burden of proof. He was merely stating that he did not believe that it was more probable than not that this fact was true.

B. In the Immigration and Nationality Act there is no prescription concerning burden of proof, though Congress did prescribe concerning quantum of proof.

That Congress has recognized the distinction between burden and quantum is illustrated by APA §7(c), which reads as follows:

Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. . . . [No] rule or order [shall] be issued except . . . as supported by and in accordance with the reliable, probative, and substantial evidence.

We note the remarkable similarity between "reliable, probative, and substantial," in this section, with "reasonable, substantial, and probative," in §§106 and 242 of the Immigration and Nationality Act. We observe that, notwithstanding the remarkable similarity (and evident borrowing), *Congress chose to say nothing about burden of proof in the Immigration and Nationality Act*. The textual proximity of the burden concept and the quantum concept in the APA was not enough to convince the draftsmen of the Immigration and Nationality Act and its 1961 amendments that, along with quantum, they should also deal with burden. See *Matter of V*, 7 I. & N. DEC. 460, 463 (1957) ("the act does not speak of the burden of proof").

Thus the immediately applicable statute prescribes nothing vis-à-vis burden. Does that mean there is no law regarding burden? Certainly not. The APA and the Immigration and Nationality Act and many other statutes deal extensively with administrative procedure; but many procedural rules—perhaps most—are the product of judicial lawmaking.

For decades, rules that govern burdens of proof in alien proceedings have been made by courts; and here the over-all doctrine is that the Government has the burden of proving deportability. See *Hughes v. Tropello*, 296 FED. 306, 309 (3d

Cir. 1924) ("due process"). In apparent recognition of that doctrine Congress has switched the burden from the Government to the individual in two special situations: see §241(a)(3) and (8) and §291 of the Immigration and Nationality Act. Further, in the 1961 amendments that included §106 of the Act and dealt with quantum only (see above), Congress indicated its awareness of rules that, in proceedings other than deportation, deal with degrees of belief (e.g., "preponderance" compared with "clear, unequivocal, and convincing"). See §349(c) of the Act and H.R. REP. 1086, pp. 39-41 (1961). As yet, however, *Congress has taken no action whatsoever to guide or interfere with the judicial articulation of rules that deal with degrees of belief of the trier of fact concerning deportability.*

III. To require more than a preponderance of evidence would not introduce confusion and uncertainty into deportation law, as Judge Friendly seemed to fear.

In general, "burden of proof" refers to the burden of proving the fact in question by a preponderance of the evidence"; often, though, "a heavier or lesser burden is specially required in a particular case by constitutional, statutory, or decisional law." (The quotations are from the Assembly Judiciary Committee's comments on §115 of the new, 1965, CALIFORNIA EVIDENCE CODE.)

Judge Friendly stated below, "I fear that imposing a special judicially prescribed burden of persuasion on an ill-defined group of cases will introduce confusion and uncertainty into deportation law." 350 F.2d at 900. He then conceded, though, that "[i]f the slate were clean" (i.e., if Congress seemingly had not intervened), perhaps "the standard of persuasion should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail." *Ibid.*

We have just shown (above) that, in fact, the slate is clean and that Congress has not intervened on this issue. No statutory words are applicable. We now suggest that to require the Gov-

ernment in this kind of case to produce more than a preponderance would not introduce confusion and uncertainty.

A. "This kind of case" can be defined.

Our contentions concern long-time residents, not aliens who only recently came to America. This Court has recognized that for many purposes those two kinds of people ought to be treated differently. See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).⁴ The borderlines are not of course merely temporal. "As with the doctrine of laches, there will enter into the mix the lapse of time, the character of the proof, and the severity of the consequences." Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918 (1966). Specific questions will involve the remoteness of the alleged misconduct, the relation between the misconduct and inadmissibility at the time of entry (cf. Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J. 262, 290 (1959)), the relation between the misconduct and the concept "undesirable resident" (cf. Maslow, *Recasting our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 332 (1956)), the man's age when he began his permanent residence, his family situation, etc. These are the factors that make "high-burden" cases out of long-time-residence cases, and lawmen by no means are inexperienced in thus relating burdens of proof and degrees of damage to a man's liberty.

⁴ We note Petitioner's suggestion that a higher burden of persuasion be imposed in all cases of expulsion of permanent resident aliens. *Brief for Petitioner*, p. 15. Such a rule would have the virtue of simplicity, and there are other considerations supporting it. Before an alien acquires the status of permanent resident he must survive two screenings, one by the consular service abroad, and another by the immigration service at the border. Both times he must, in effect, establish his right to enter beyond a reasonable doubt, since the Government asserts the right at either stage to reject his claim without giving any reason. It might be reasonable, therefore, to require the Government to establish its double error, or the alien's compounded fraud, by a higher burden of persuasion regardless of the length of residence. Compare *Lee Hon Long v. Dulles*, 261 F.2d 719 (9th Cir. 1958); *Delmore v. Brownell*, 236 F.2d 598 (3rd Cir. 1956) (imposing the burden of persuasion required for denaturalization when an alleged citizen established that the Service had accepted his claim). This reasoning is more compelling when the alien's roots here are evidenced by a citizen family.

B. Immigration officials have had long experience in applying variant burdens of proof.

Here are random excerpts that, in response to Judge Friendly, imply the question, Has the law been characterized by certainty and lack of confusion?

[W]e are unable to say that appellant has proved beyond a reasonable doubt that he was entitled to remain in the United States.—*Moy Guey Lum v. United States*, 211 Fed. 91, 95 (7th Cir. 1914), cert. den., 234 U.S. 756.

The rule of proof in deportation proceedings is not proof beyond a reasonable doubt but such a hearing as will enable the alien to present his proof or evidence that he has not made himself a subject to deportation.—*In re Giacobbi*, 32 F. Supp. 508, 517 (N.D. N.Y. 1939).

[W]e think there was evidence from which a trier of fact could conclude that Sui was an alien. And it would pass as a preponderance, as clear, cogent and convincing, or as beyond a reasonable doubt.—*Wong Kwok Sui v. Boyd*, 285 F.2d 572, 575 (9th Cir. 1960).

Not only has the Supreme Court never announced the "clear, unequivocal and convincing" rule for such a [deportation] proceeding, it has never announced that any court in reviewing such a decision can decide whether or not the mere burden of proof has been or has not been sustained. When some evidence supporting the decision has been found, the reviewing court's decision is definitely fixed.—*Bridges v. Wixon*, 144 F.2d 927, 938 (9th Cir. 1944) (Stephens, J. concurring).

[I]n his [the hearing officer's] opinion plaintiff's testimony was not of such convincing character as to overcome his sworn statement. The issue of credibility is solely the function of the hearing officer and not reviewable by the court. . . . The decision of the

district court rests upon a record with *sustaining evidence of a substantial, convincing and compelling character*, therefore the order dismissing the petition for review is affirmed.—*Lattig v. Pilliod*, 289 F.2d 478, 480 (7th Cir. 1961) (*italics added*).

That the wrong burden of proof was applied was held in *Mar Gong v. Brownell*, 9 Cir., 209 F.2d 448, a decision before the instant decision of the Board of Immigration Appeals. We there held . . . that "no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin. . . . [T]he Board treated the hearing of the appeal as a trial de novo and reappraised the evidence adversely to appellant. Instead, it should have returned the case to the special inquiry officer who heard these witnesses for his appraisal of the evidence applying the ordinary burden of proof.—*Ng Yip Yee v. Barber*, 225 F.2d 707, 708 (9th Cir. 1955).

This Court has said that in a denaturalization case, "instituted . . . for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman v. United States*, 320 U.S. 118, 122. . . . The same principle applies to expatriation cases, and it calls for placing upon the Government the burden of persuading the trier of fact by clear, convincing, and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed.—*Nishikawa v. Dulles*, 356 U.S. 129, 134 (1958).

C. In this case the deciding officials may well have been confused about what is meant by burden of proof.

The special inquiry officer appears to have asked himself, "Was there enough evidence?" Not, "How strongly should I believe before I decide?" Thus (R. 67), "The burden of establishing deportability by reasonable, substantial, and probative

evidence is on the Government. . . ." And (R. 70), "the Government has established with a solidarity far greater than required that respondent . . . reentered the United States December 20, 1938, claiming to be a citizen. . . ." Note that the word was "solidarity" (whatever that may mean) when it should have been persuasiveness (or, perhaps, "solidity"). Note too that "far greater than required" seems hyperbolic no matter which word is used.

"[W]e are not unmindful of the collateral discrepancies and contradictions uncovered during the extensive cross-examination . . .," he said. "Those, however, which appear to be but the usual frailties of memory, create an aurora of credibility and reliability to the witness' testimony as a whole." (R. 71) That "aurora" [*sic*] scarcely aids our identifying the degree of the inquiry officer's belief.

That the Board of Immigration Appeals may have been aware of degrees of belief is shown by this statement:

[I]t is established *beyond any reasonable doubt* that the respondent himself applied for the passport. . . .— (R. 78) (*italics added*).

Further, the Board said, "proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it." *Ibid.* That presumption, together with Morrow's testimony, was enough.

Our conclusion that the respondent was outside the United States after his original entry in 1920, is not based upon his silence but upon uncontradicted proof that he was seen abroad, and his action in applying for a document which described him, which was meant to be used by one going abroad, and which was used abroad.—(R. 80)

What persuasive power had the "uncontradicted proof" thus mentioned? Hardly "beyond any reasonable doubt" or clear, unequivocal, and convincing. At best one observes the language of bare preponderance: "We find the witness credible and his testimony probative and substantial. . . . [T]hough not

close; . . . [a]ssociations connected with this period [1937-38] could well remain despite the passage of years [i.e., 26 years]." (R. 77)

IV. There are compelling reasons why more than a preponderance of evidence should be required.

We urge that the Court pronounce, as either due process or a declared rule of decent procedure, the view that burdens of proof vary with the degrees of damage to an individual's liberty. That view produced "beyond a reasonable doubt" in criminal cases as well as "clear, unequivocal, and convincing" in citizenship cases; and law reform hardly should halt at those two boundaries. Especially when there is no persuasive evidence that Congress had a contrary intent, the standard for long-time residents in deportation cases should "be similar to that in denaturalization," as Judge Friendly implied.

Our contention here is not that the deportation of long-time residents should be labeled criminal punishment. Instead we suggest that the Court (1) again recognize the "doom" that such deportation entails (see below), and (2) articulate for governing officials the obvious relation of long-timeliness, doom, and persuasiveness of evidence.

Reliable truth-determining is only partly ensured by dichotomies such as criminal-civil and criminal-administrative. Should the lack of criminal punishment automatically lead us to deny all those criminal-procedure guarantees that can be withheld in "the typical civil trial?" Certainly not. Cf. *Schneiderman v. United States*, 320 U.S. 118, 160 (1943) ("A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status."); *Bean v. Barber*, 163 F. Supp. 111 (N.D. Calif. 1958) (Government can hardly avoid the clear, unequivocal, and convincing rule when its action is "equivalent to" expatriation); and see *United States v. Murff*, 170 F. Supp. 182, 185 (S.D. N.Y. 1959), suggesting that, in deportation cases, evidence to prove a marriage invalid should be "strong, distinct, satisfactory, and conclusive."⁶

⁶ The reasons that led Congress in §349(c) of the Act to modify *Gonzales*

Procedural guarantees are constructed to aid the pursuit of truth. They are not prefabricated scaffoldings, used only when a case fits the blueprints we label "criminal," "naturalization," "discretionary relief," etc.*

A. *The problem of staleness.*

In this case the cross-examination of Edward Morrow exposed, dramatically, the quirks of men's memories. See R. 21-39 and 49-62.⁷ When government orders that brutally uproot United States residents must be based on that kind of testimony, should it not constitute convincing not merely preponderant evidence? Identifications induced by prosecution-sponsored peep-holing, on the day that the testimony is to be heard (R. 60 and 76), are presumptively suspect when faces and events to be recalled are more-than-a-quarter century dimmed. Even without that dimming, misidentification is one of the prime contributors to miscarriage of justice. See Borchart, *CONVICTING THE INNOCENT* 367 (1932); cf. *Wade v. United States*, 358 F.2d 557 (5th Cir. 1966).

"If the Government is to turn the clock back after all these years, it should meet a standard of proof which is not meagre." *Lee Hon Lung v. Dulles*, 261 F.2d 719, 724 (9th Cir. 1958). Evidence to prove that an illegal entry was made 26 years ago by a man who, even then, had resided here for 18 years inevitably is doubtful evidence. Patently, when the Government to

v. Landon, 350 U.S. 920 (1955) and *Nishikawa v. Dulles*, 356 U.S. 129 (1958) do not fit our case. See H.R. REP. 1086, pp. 40-41 (1961); cf. Justice Brennan's opinion in *Kimm v. Rosenberg*, 363 U.S. 405, 412 n.2 (1960).

* Cf. Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215, 219 (1961); *Gonzalez-Jasso v. Rogers*, 264 F.2d 584, 587 (D.C. Cir. 1959): "If uncorroborated admissions are insufficient to convict a man of a crime, they should hardly suffice to deprive him of citizenship. . . ."

⁷ Strangely, the SS *Aquitania* was the ship to France that during June 1937 took from New York not only the man named Samuel Levine, alleged to be Petitioner here, but also a man named Frank C. Newman, co-author of this brief. To project into the 1960's the latter's recollections of his shipmates would be illuminating, speculatively.

demonstrate that such acts, in truth, did occur must rely on recollections so aged, it should meet a standard which is not meagre.

Arguing in the court below, the United States Attorney suggested that "The remoteness of the entry in this case [i.e., in 1938] does not significantly affect the problem of proof, except to impose investigative difficulties on the Service in reaching back to establish the facts." Petition for Rehearing, p. 5. *Those "investigative difficulties" are exactly what we stress.* When the investigators do reach back that many years, the law fairly requires the Service to consider not only the bulk but also the persuasiveness of testimony that so inherently has been difficult to discover.

For purposes of this case we concede that the staleness of the charge did not violate any statute of limitations. Cf. the minority opinion below, 350 F.2d at 895, n. 1. The legislative decision not to intrude with a statute does not mean, though, that administrators and judges therefore should ignore all problems that staleness creates. The doctrine of laches that courts developed proves that. Cf. Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918 (1966).

Nearly one hundred years ago this Court commented on "... the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity This presumption is made by these statutes [of limitations] a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and *the imperfect recollection of others*, or the destruction of documents, it might be impossible to establish the truth. . . ." *Riddlesbarger v. Hartford Ins. Co.*, 7 WALL. 386, 390 (1869) (*italics added*).

Long-time residents may need no statute of limitations or laches doctrine. But to impose a higher burden of persuasion, thus moderately protecting those residents from "the imperfect recollection of others," surely would be a contribution to de-

gency. Individuals, unlike bureaucracies, typically do not keep records over the decades to refresh their recollection.

B. The "doom" that awaits Petitioner.

A citizen can vote and enjoys an unconditional right to return if he leaves the country. Otherwise, at least in time of peace, there is little affirmatively to distinguish citizen from permanent resident alien. The essence of either status is the right to remain. This Court has repeatedly recognized the crucial value of continued residence to an alien who has become rooted here.⁸ Equally vital is his citizen family's right to continued love, support, companionship and other precious, however intangible, human associations. These are matters that should not be ignored when prescribing the procedural prerequisites to the power asserted here. Compare *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957).⁹

C. The penal nature of expulsion in this case.

What is the power asserted here? Its evolution makes clear that today expulsion is more a police than a regulatory power.

⁸ *E.g.*, *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (Douglas, J.); *Costello v. INS*, 376 U.S. 120, 128 (1964) (Stewart, J.). See also *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521, 533-34 (1950) (Frankfurter, J. dissenting) (coining the phrase "doom of deportation"); *Jordan v. DeGeorge*, 341 U.S. 223, 243 (1951) (Jackson, J. dissenting) (characterizing deportations as a "savage penalty"). See also *Appendix to Brief for Petitioner*, *Rowoldt v. Perfetto*, 355 U.S. 115 (1957).

⁹ Both the majority below (350 F.2d at 900 n.1) and the Government here (*Brief in Opposition*, p. 2) noted the discretionary authority for suspension of deportation. This fact is apparently deemed relevant on the theory that it blunts much of the horror of expulsion of rooted residents. But assuming petitioner did not enter unscreened in 1938, in order to avail himself of such relief he would be required to commit perjury; and, assuming he did so enter, there is no assurance that the Attorney General will dispense the relief. See *Jay v. Boyd*, 351 U.S. 345 (1956). To prescribe the burden of persuasion of the Government on the basis whether an alien is or is not willing to seek discretionary relief would amount to shifting the burden of proof to the alien, making him prove his right to remain. Compare *Griffin v. California*, 380 U.S. 609 (1965), with *Kimm v. Rosenberg*, 363 U.S. 405 (1960).

Expulsion was first prescribed because of the need, after hurried screening of masses of aliens continuously arriving unannounced, to make entry conditional long enough for administrative correction of erroneous decisions made at the border. *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); *Pearson v. Williams*, 202 U.S. 281, 284 (1906). The power was extended by congressional prescription of conclusive presumptions of inadmissibility on proof of undesirable conduct after entry that indicated an initial disqualification to enter. Such presumptions should be tested like other conclusive presumptions. Compare *Keller v. United States*, 213 U.S. 138, 149-50 (1909) (Holmes, J. dissenting),¹⁰ with *Tot v. United States*, 319 U.S. 463, 467-68 (1943).

Yet, since 1917, Congress has asserted wholesale power to expel resident aliens regardless of the relation between proscribed resident conduct and initial qualification to enter. Hesse, *The Constitutional Status of The Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J. 262 (1959). It is thus no longer possible to assert, as Justice Holmes did for the Court in *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913), that "the coincidence of local penal law with the policy of Congress is an accident." On the contrary, §§241 and 242 of the Immigration and Nationality Act read far more like a penal code than a statute purporting to regulate immigration.¹¹ As early as 1940, a Service official confessed: "We are now an emigration service, whereas we were formally an immigration service."¹²

¹⁰ Justice Holmes disagreed with the majority over what was necessary and proper for the regulation of immigration, not about the nature of the power itself. See *Looe Shee v. North*, 170 F.2d 566, 571 (9th Cir. 1909).

¹¹ For details, see, e.g., Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J., 262-65, 270-71 (1959); Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L. J. 760, 789 n. 143 (1962). See also, Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 314-17 (1956).

¹² Secretary of Labor's Committee on Administrative Procedure, *THE IMMIGRATION AND NATURALIZATION SERVICE* 10 (1940). Almost simultaneously, in 1940, Congress appropriately transferred responsibility for

We suggest, therefore, that for purposes of the burden of persuasion imposed on the Government, Petitioner be equated either with a naturalized citizen—compare *Schneiderman v. United States*, 320 U.S. 118, 123 (1943)—or with those resident aliens whose present undesirability is proved by conviction of criminal conduct—see Point V (below). And since more than a preponderance of evidence should have been but was not required, under APA §10(e) the agency's findings must be set aside because they are "without observance of procedure required by law."

V. APA §10(e)(B)(1) requires that the agency action be set aside because it was "arbitrary, capricious, [and] an abuse of discretion."

The action here was arbitrary and capricious because of the built-in discrimination against non-criminal residents. Once their period of residence has passed five years, most aliens are deportable only when they have been convicted of a crime and thus have had the full benefit of "beyond a reasonable doubt" and other Anglo-American protections. Petitioner in this case is among the small class whose alleged misconduct long ago involves not proved crime but questioned entry or re-entry, proscribed political activities, immorality, etc. See §241(a) of the Immigration and Nationality Act. To discriminate procedurally in favor of the proved criminal, by giving the non-criminal less protection, scarcely seems fitting. Cf. *Baxtrom v. Herold*, 383 U.S. 107 (1966).

What should be said regarding the exercise of the agency's discretion here? That discretion, a directive by Congress, can be characterized as follows: Regardless of lapse of time and length of residency, seek out and expel those aliens who have committed misdeeds and thus seem undesirable. Did Congress intend that such discretion be errant and limitless? Hardly. See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965). Was it not abused in a case where the sole charge against a man, 43 years resident, was that 25 years ago "you entered the United States without inspection?"

enforcement of its immigration policies from the Labor Department to the Justice Department. See SEN. REP. 1515, pp. 290-91 (1950).

(R. 1) Why should that single datum, now, permit any rational bureaucracy to banish such a man to Poland, a country he knew only as a 14-year-old boy, 46 years ago? Especially when the sole testimony showing that he may have left and then returned to the United States is as shaky as was Edward Morrow's testimony here, we submit that abuse of the discretion Congress conferred is clearly shown. Accordingly, the agency's findings must be set aside under APA §10(e)(B)(1).

CONCLUSION

Judges Waterman and Smith in their dissenting opinion below demonstrated that our legal system can both respond humanely to the interests of the alien faced with exile and at the same time ensure a sound, fair administration of our expulsion laws. Whatever may be the Court's decision in this case, for the foregoing reasons we urge that in reaching its decision it adopt the approach of the dissenting judges below.

October 11, 1966.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 80

JOSEPH SHERMAN, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR PETITIONER

I. The absence of a statutory standard of proof.

1. If we understand the government's Brief, it does not defend Judge Friendly's holding that §§ 242(b)(4) and 106(a)(4) of the Immigration and Nationality Act establish *ex proprio vigore* a standard of proof which applies "to the Service" (R. 95). Such a defense would have called for a rebuttal of our demonstration (Pet. Br. 12-14) that these sections, by their language, legislative history and

administrative construction, relate to judicial review and to the quality of the evidence as distinguished from the burden of proof in the administrative proceeding. No such rebuttal is attempted. Indeed, the heading of the relevant portion of the government's argument is not that Congress has adopted Judge Friendly's, or any other, standard of proof, but merely (Gov. Br. 13) that, "A. Congress has not adopted the standard urged by petitioner." That argument is superfluous in view of our assertion (Pet. Br. 11) that, "The standard of proof in deportation cases has not been prescribed by Congress. . . ."

Moreover, the government acknowledges (Br. 13, fn. 9) that "the statute is silent on the point" of the location of the burden of proof. It is impossible to visualize that Congress could have defined the burden of proof without saying who had to carry it.

Nevertheless, the government does assign some kind of role to § 242(b)(4). The theory seems to be that this section, though not directly applicable, exerts an atmospheric influence whereby the standard of proof, whatever it is, is not that urged by petitioners.

So the government contends that while the Act "does not expressly advert to the degree of persuasion that the factfinder must have," § 242(b)(4) "implies that the administrative factfinder must be reasonably persuaded on the basis of substantial and probative evidence that the alien is in fact deportable. Any higher standard would appear excluded by the specific provision of the Act which makes the procedure there prescribed exclusive." Gov. Br. 10-11, and see 14.

Since it is uncontested and uncontestable that § 242(b)(4) merely establishes the judicial review standard, the government is thus making the rudimentary error of supposing that the review standard establishes the maximum standard of proof at the evidentiary hearing (see Pet. Br. 12). The government forgets its prior statement (Br. 8),

"The distinction between the factfinding responsibilities of agency and reviewing court is fundamental to this case."

It is altogether irrelevant that § 242(b) provides that the "procedure prescribed" by it shall be "exclusive." Since the section says nothing about the nature or location of the administrative burden of proof, it seems probable that the standard of proof was not considered a "procedure." But if it was, there is still no standard "prescribed" by the section, and hence no statutory "exclusive" standard.

2. The government also involves section 242(b) by suggesting (Br. 16) that Congress must have had in mind that at the time the section was enacted, "it was already well established that the criminal standard of proof was not applicable in the deportation field." There are two things wrong with the suggestion.

First, at the time of enactment Congress thought that § 242(b)(4) related exclusively to the subject of judicial review. See Pet. Br. 13, quoting from S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 30.¹ Congress therefore had no occasion to contemplate the decisions relating to the standard of proof in the administrative hearing.

Secondly, there was, and still is, no "well established" body of law on the subject. The government's citations (Br. 16, fn. 14) show this fact, consisting as they do of (1) a sentence in a dissenting opinion in a criminal case; (2) a case reversed by this Court on grounds which involved rejection of the evidentiary analysis of the Service and the Ninth Circuit; and (3) an obscure District Court case, decided in 1939, which applied the admit-

¹ As we pointed out (Pet. Br. 13), the passage we quoted from the Senate Report differs slightly from the corresponding passage in the House Report. The government (Br. 24) quotes the text as it appears in the House Report and cites its quotation to both Reports.

tedly erroneous view that the alien has the burden of proving non-deportability.²

3. The government also argues (Br. 16) that the legislative adoption of administrative adjudication of deportability implies a rejection of "the stringent criminal or fraud standards of persuasion" because, "These standards are foreign to administrative proceedings and far stricter than anything known to administrative law."

In the first place, the clear and convincing standard (which the government calls the "fraud standard"³) is not foreign to administrative proceedings. It has been used by the Service in deportation cases where loss of citizenship is in issue. *Matter of G---* R---, 3 I. & N. Dec. 141, 148 (1948); *Matter of Peralta*, 10 I. & N. Dec. 43 (1952). And we have no doubt that the Service would, and would be required to, do the same in determining other issues to which that standard is applied by judicial consensus.

Secondly, other types of administrative adjudication are not analogous because they do not involve the deprivation of personal liberty effected by deportation and even by the deportation proceeding itself (see Pet. Br. 19).

² "The rule of proof in deportation proceedings is not proof beyond a reasonable doubt but such a hearing as will enable the alien to present his proof or evidence that he has not made himself a subject to deportation." *In re Giacobbi*, 32 F. Supp. 508, 517 (S.D. N.Y.).

³ We must deplore this tactic. As we pointed out (Pet. Br. 16, fn. 4), the Court has applied this standard in non-fraud cases. The standard, or an even higher one, has also been applied by other courts in a host of non-fraud civil cases, including cases involving proof of adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, etc. See pocket-part supplement to 9 Wigmore, Evidence (3d ed.) § 2498. It may be noted that in England adultery and illegitimacy of a child born in wedlock must be proved in civil cases beyond a reasonable doubt. *Ginesi v. Ginesi*, C.A., [1948] 1 All E.R. 373; *Cotton v. Cotton*, C.A., [1954] 2 All E.R. 105; *Preston-Jones v. Preston-Jones*, H.L., [1951] 1 All E.R. 124. Accord as to illegitimacy: *Ratliff v. Ratliff*, 298 Ky. 715, 183 S.W.2d 949, 952.

4. Since Congress has not legislated a standard of proof, some other agency of government must prescribe one. The government asserts (Br. 17) that the judiciary is not a proper agency for this purpose because the fact-finding function has been confided to the administrative process. This seems a clear non-sequitur.

The government does not state who should devise the standard of proof if the judiciary does not. There can be only one other candidate for the job, the Department of Justice. Considering the impact of deportation on personal liberty, the prosecutorial role of the Department and the sad history of abuse of deportation processes, that candidate is manifestly an inappropriate selection.

II. The proper standard of proof.

Contrary to the government's belief (Br. 19-21), there would be nothing extraordinary in requiring in deportation cases, especially those involving long-time resident aliens, a higher degree of persuasion than the preponderance of the evidence. Such higher standards, including proof beyond a reasonable doubt, have been imposed in types of cases which do not involve as drastic consequences or as punitive features as deportation proceedings. See *supra*, p. 4, fn. 3; Pet. Br. 17-19. Nor is the standard of proof in criminal cases attributable to the presence of a jury (Gov. Br. 20), since the same standard applies in criminal cases tried without a jury.

III. The standard of proof applied in this case.

The government suggests that a higher standard than preponderance was employed in this case. It states that the Attorney General "was solidly convinced, not doubtful" (Br. 10) and that he "was firmly persuaded" (Br. 13). It seems to recognize, however, that this state of mind was not reached by applying either the clear and convincing standard or the criminal standard of proof beyond a reasonable doubt (see Gov. Br. 14, 16, 18-20).

The Attorney General, of course, never personally considered this case, and the government is relying on statements of the special inquiry officer and the Board of Immigration Appeals. As the government points out (Br. 13), the special inquiry officer stated that the Service had established its case "with a solidarity [sic] far greater than required" (R. 70). The observation is not illuminating, since the special inquiry officer never said what degree of "solidarity" was required. Moreover, the same special inquiry officer failed to analyze or describe the deficiencies in Morrow's testimony, while observing that the undescribed "discrepancies and contradictions" in that testimony "create an aurora [sic] of credibility and reliability" (R. 71).

The Board of Immigration Appeals, as the government states (Br. 13), remarked that it was a "most unlikely hypothesis" that someone other than petitioner used the passport (R. 79). But the Board came to that conclusion only by first holding that "proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it" (R. 78). This presumption is not compatible with a high standard of proof. Even if it might be presumed, on the basis of common experience, that regularly issued passports are used by the citizens who obtain them, there is no such cognizable body of experience as to passports issued on fraudulent applications of non-citizens under false identities.

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SUPREME COURT OF THE UNITED STATES

Nos. 40 AND 80.—OCTOBER TERM, 1966.

Elizabeth Rosalia Woodby,
Petitioner,
40 v.
Immigration and Naturali-
zation Service.

On Writ of Certiorari to
the United States Court
of Appeals for the Sixth
Circuit.

Joseph Sherman, Petitioner,
80 v.
Immigration and Naturali-
zation Service.

On Writ of Certiorari to
the United States Court
of Appeals for the Second
Circuit.

[December 12, 1966.]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented by these cases is what burden of proof the Government must sustain in deportation proceedings. We have concluded that it is incumbent upon the Government in such proceedings to establish the facts supporting deportability by clear, unequivocal, and convincing evidence.

In *Sherman* (No. 80), the petitioner is a resident alien who entered this country from Poland in 1920 as a 14-year-old boy. In 1963 the Immigration and Naturalization Service instituted proceedings to deport him upon the ground that he had re-entered the United States in 1938, following a trip abroad, without inspection as an alien.¹ After a hearing before a special inquiry officer,

¹ Section 241 (a) (2) of the Immigration and Naturalization Act of 1952, 66 Stat. 163, 204, 8 U. S. C. § 1251 (a) (2), provides for deportation of any alien who "entered the United States without inspection or at any time or place other than as designated by the Attorney General. . . ." Prior to 1952, the Government was required to bring deportation proceedings within five years of an

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the petitioner was ordered to be deported, and the Board of Immigration Appeals dismissed his appeal.²

The Government's evidence showed that the petitioner had obtained a passport in 1937 under the name of Samuel Levine, representing himself as a United States citizen. Someone using this passport sailed to France in June 1937, proceeded to Spain, returned to the United States in December 1938, aboard the S. S. *Ausonia*, and was admitted without being examined as an alien. To establish that it was the petitioner who had traveled under this passport, the Government introduced the testimony of Edward Morrow, an American citizen who had fought in the Spanish Civil War. Morrow was at first unable to remember the name Samuel Levine or identify the petitioner, but eventually stated that he thought he had known the petitioner as "Sam Levine," had seen him while fighting for the Loyalists in Spain during 1937 and 1938, and had returned with him to the United States aboard the S. S. *Ausonia* in December 1938. Morrow conceded that his recollection of events occurring 27 years earlier was imperfect, and admitted that his identification of the petitioner might be mistaken.

It is not clear what standard of proof the special inquiry officer and the Board of Immigration Appeals on *de novo* review applied in determining that it was

alleged illegal entry, 39 Stat. 874, 889 (1917), as amended, 8 U. S. C. § 155 (a) (1946). Thus, under the prior law, the petitioner would not have been subject to deportation proceedings commenced after 1943. However, this time limit was retroactively eliminated by the 1952 Act, § 241 (d), 66 Stat. 208, 8 U. S. C. § 1251 (d). See Developments in the Law—Immigration and Naturalization, 66 Harv. L. Rev. 643, 683-684.

² In conformity with its usual practice, the Board made its own independent determination of the factual issues after *de novo* examination of the record. See Gordon & Rosenfield, Immigration Law and Procedure, 46-47 (1959).

the petitioner who had traveled to Spain and re-entered the United States under the Samuel Levine passport. At the outset of his opinion, the special inquiry officer stated that the Government must establish deportability "by reasonable, substantial, and probative evidence," without discussing what the burden of proof was. Later he concluded that the Government had established its contentions "with a solidarity far greater than required," but did not further elucidate what was "required." The Board of Immigration Appeals stated that it was "established beyond any reasonable doubt" that the petitioner had obtained the Samuel Levine passport, and added that this established a "presumption" that the petitioner had used it to travel abroad. The Board further stated that it was a "most unlikely hypothesis" that someone other than the petitioner had obtained and used the passport, and asserted that "the Service has borne its burden of establishing" that the petitioner was deportable, without indicating what it considered the weight of that burden to be.

Upon petition for review, the Court of Appeals for the Second Circuit originally set aside the deportation order, upon the ground that the Government has the burden of proving the facts supporting deportability beyond a reasonable doubt.³ The court reversed itself, however, upon a rehearing *en banc*, holding that the Government need only prove its case with "reasonable, substantial, and probative evidence."⁴ We granted certiorari, 384 U. S. 904.

In *Woodby* (No. 40), the petitioner is a resident alien who was born in Hungary and entered the United States

³ 350 F. 2d 894.

⁴ 350 F. 2d 901. The court adopted the reasoning of the opinion which Judge Friendly had filed as a dissent to the original decision. Judges Waterman and Smith, who had formed the original majority, dissented.

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from Germany in 1956 as the wife of an American soldier. Deportation proceedings were instituted against her on the ground that she had engaged in prostitution after entry.⁵ A special inquiry officer and the Board of Immigration Appeals found that she was deportable upon the ground charged.

At the administrative hearings the petitioner admitted that she had engaged in prostitution for a brief period in 1957, some months after her husband had deserted her, but claimed that her conduct was the product of circumstances amounting to duress. Without reaching the validity of the duress defense, the special inquiry officer and the Board of Immigration Appeals concluded that the petitioner had continued to engage in prostitution after the alleged duress had terminated. The hearing officer and the Board did not discuss what burden of proof the Government was required to bear in establishing deportability, nor did either of them indicate the degree of certainty with which they reached their factual conclusions. The special inquiry officer merely asserted that the evidence demonstrated that the petitioner was deportable. The Board stated that the evidence made it "apparent" that the petitioner had engaged in prostitution after the alleged duress had ended, and announced that "it is concluded that the evidence establishes deportability. . . ."

In denying a petition for review, the Court of Appeals for the Sixth Circuit did not explicitly deal with the

⁵ Section 241 (a) (12) of the Immigration and Naturalization Act of 1952, 66 Stat. 207, 8 U. S. C. § 1251 (a) (12), provides for the deportation of any alien who "by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212 (a);" Among the classes specified in § 212 (a) (12) of the Act, 66 Stat. 182, 8 U. S. C. § 1182 (a) (12), are "Aliens who are prostitutes or who have engaged in prostitution. . . ."

issue of what burden of persuasion was imposed upon the Government at the administrative level, fixing only that "the Board's underlying order is 'supported by reasonable, substantial, and probative evidence on the record considered as a whole. . . .'" We granted certiorari, 384 U. S. 904.

In the prevailing opinion in the *Sherman* case, the Court of Appeals for the Second Circuit stated that "[i]f the slate were clean," it "might well agree that the standard of persuasion for deportation should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence must be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail. . . . But here," the court thought, "Congress has spoken" 350 F. 2d, at 900. This view was based upon two provisions of the Immigration and Naturalization Act which use the language "reasonable, substantial, and probative evidence" in connection with deportation orders. The provisions in question are § 106 (a)(4) of the Act which states that a deportation order, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive,"* and § 242 (b)(4) of the Act which provides *inter alia* that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

It seems clear, however, that these two statutory provisions are addressed not to the degree of proof required at the administrative level in deportation proceedings, but to quite a different subject—the scope of judicial review. The elementary but crucial difference between burden of proof and scope of review is, of course, a com-

* 75 Stat. 651 (1961), 8 U. S. C. § 1105 (a)(4).

† 66 Stat. 210 (1952), 8 U. S. C. § 1252 (b)(4).

monplace in the law.⁹ The difference is most graphically illustrated in a criminal case. There the prosecution is generally required to prove the elements of the offense beyond a reasonable doubt.¹⁰ But if the correct burden of proof was imposed at the trial, judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment. In other words, an appellate court in a criminal case ordinarily does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment is supported by substantial evidence.¹¹

That § 106 (a) (4) relates exclusively to judicial review is made abundantly clear by its language, its context, and its legislative history. Section 106 was added to the Act in 1961 in order "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States."¹² The section is entitled "Judicial Review of Orders of Deportation and Exclusion," and by its terms provides "the sole and exclusive procedure for, the judicial review of all final orders of deportation." Subsection 106 (a) (4) is a specific directive to the courts in which petitions for review are filed.¹³

⁹ See Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 Harv. L. Rev. 914 (1966); Comment, 41 N. Y. U. L. Rev. 622 (1966); *Standard of Proof in Deportation Proceedings*, 18 Stan. L. Rev. 1237 (1966).

¹⁰ See McCormick, *Evidence* 681-685 (1954); 9 Wigmore, *Evidence* § 2497 (3d ed. 1940).

¹¹ E. g., *Rutkin v. United States*, 343 U. S. 130, 135. For discussion of variations and alternatives to the usual rule, see Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149, 1157-1163 (1960).

¹² H. R. Rep. No. 1086, 87th Cong., 1st Sess., 22.

¹³ "Judicial Review of Orders of Deportation and Exclusion

"Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat.

It is hardly less clear that the other provision upon which the Court of Appeals for the Second Circuit relied, § 242 (b)(4) of the Act, is also addressed to reviewing courts, and, insofar as it represents a yardstick for the administrative factfinder, goes not to the burden of proof, but rather to the quality and nature of the evidence upon which a deportation order must be based.¹² The provision declares that "reasonable, substantial, and probative evidence" shall be the measure of whether a deportability decision is "valid"—a word that implies scrutiny by a reviewing tribunal of a decision already reached by the trier of the facts. The location of this provision in a section containing provisions dealing with procedures before the special inquiry officer has little significance when it is remembered that the original 1952 Act did not itself contain a framework for judicial review—although such review was, of course, available by habeas corpus or otherwise. See *Marcello v. Bonds*, 349 U. S. 302. And whatever ambiguity might be thought to lie in the location of this section is resolved by its

1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . except that—

"(4) . . . the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive; . . ." 75 Stat. 651 (1961), 8 U. S. C. § 1105 (a).

¹² This has been recognized by the Board of Immigration Appeals itself:

"Finally, it is important to bear in mind the distinction between the burden of proof and the quality of the evidence which is required to establish that burden successfully. It is to be noted that subsection (b)(4) of section 242 of the act does not speak of the burden of proof but of the quality of the evidence which the Service must produce before deportability can validly be found. . . ." *Matter of V*, 7 I & N Dec. 460, 463.

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legislative history. The Senate Report explained § 242 (b)(4) as follows: "The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that of the administrative body."¹⁴

We conclude, therefore, that Congress has not addressed itself to the question of what degree of proof is required in deportation proceedings. It is the kind of question which has traditionally been left to the judiciary to resolve,¹⁵ and its resolution is necessary in the interest of the evenhanded administration of the Immigration and Nationality Act.

The petitioners urge that the appropriate burden of proof in deportation proceedings should be that which the law imposes in criminal cases—the duty of proving the essential facts beyond a reasonable doubt. The Government, on the other hand, points out that a deportation proceeding is not a criminal case, and that the appropriate burden of proof should consequently be the one generally imposed in civil cases and administrative proceedings—the duty of prevailing by a mere preponderance of the evidence.

To be sure, a deportation proceeding is not a criminal prosecution. *Harisiades v. Shaughnessy*, 342 U. S. 580. But it does not syllogistically follow that a person may

¹⁴ S. Rep. No. 1137, 82d Cong., 2d Sess., 30. The House Report contains substantially identical language. H. R. Rep. No. 1365, 82d Cong., 2d Sess., 57.

¹⁵ See McBaine, *Burden of Proof: Degrees of Belief*, 32 Cal. L. Rev. 242 (1944). See also 9 Wigmore, *Evidence* §§ 2488-2493, 2497-2498 (3d ed. 1940).

be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of "the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for 40 years" *Rowaldt v. Perfetto*, 355 U. S. 115, 120.

In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence.¹⁶ The same burden has been imposed in expatriation cases.¹⁷ That standard of proof is no stranger to the civil law.¹⁸

No less a burden of proof is appropriate in deportation proceedings. The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores. And many resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.

¹⁶ *Schneiderman v. United States*, 320 U. S. 118; *Baumgartner v. United States*, 322 U. S. 665; *Nowak v. United States*, 356 U. S. 660; *Chaunt v. United States*, 364 U. S. 350.

¹⁷ *Gonzales v. Landon*, 350 U. S. 920; *Nishikawa v. Dulles*, 356 U. S. 129. But see § 349 (c) of the Immigration and Nationality Act, 75 Stat. 656 (1961), 8 U. S. C. § 1481 (c).

¹⁸ This standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like. See 9 Wigmore, Evidence § 2498 (3d ed. 1940).

"We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." Accordingly, in each of the cases before us, the judgment of the Court of Appeals is set aside, and the case is remanded to those courts with directions to remand to the Immigration and Naturalization Service for such further proceedings as, consistent with this opinion, it may deem appropriate.¹⁹

It is so ordered.

¹⁹ This standard of proof applies to all deportation cases, regardless of the length of time the alien has resided in this country. It is perhaps worth pointing out, however, that, as a practical matter, the more recent the alleged events supporting deportability, the more readily the Government will generally be able to prove its allegations by clear, unequivocal, and convincing evidence.

²⁰ Section 106 (a) (1) of the Act, 75 Stat. 651 (1961), 8 U. S. C. § 1106 (a) (1), provides that a petition for judicial review must be filed with the Court of Appeals not later than six months after a final order of deportation. In No. 40, *Woodby*, the petitioner's appeal to the Board of Immigration Appeals was dismissed on March 8, 1963, and a motion for reconsideration was denied on May 27, 1963. Petition for review by the Court of Appeals was filed more than six months after the Board upheld the deportation order, but within six months after the denial of the motion to reconsider. The Court of Appeals did not pass on the question whether, in such circumstances, its power of review was limited to consideration whether the denial of the motion for reconsideration was an abuse of discretion, or whether it might also assess in full the validity of the deportation order. Following the decision of the Court of Appeals in this case, the Court of Appeals for the Ninth Circuit held, in similar circumstances, that it had authority to undertake full review of the deportation order, as well as the denial of the motion to reconsider. *Bregman v. Immigration and Naturalization Service*, 351 F. 2d 401. In light of the *Bregman* decision, the Government before this Court expressly abandoned its contention that in this case the courts are limited to reviewing the denial of the motion to reconsider. See the Government's brief in No. 40, *Woodby*, 8, n. 3.

SUPREME COURT OF THE UNITED STATES

Nos. 40 AND 80.—OCTOBER TERM, 1966.

Elizabeth Rosalia Woodby, Petitioner, 40 v. Immigration and Naturali- zation Service.	} On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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Joseph Sherman, Petitioner, 80 v. Immigration and Naturali- zation Service.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[December 12, 1966.]

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN joins, dissenting.

The Court, by placing a higher standard of proof on the Government, in deportation cases, has usurped the legislative function of the Congress and has in one fell swoop repealed the long-established "reasonable, substantial and probative" burden of proof placed on the Government by specific Act of the Congress, and substituted its own "clear, unequivocal and convincing" standard. This is but another case in a long line in which the Court has tightened the noose around the Government's neck in immigration cases.

I.

I agree that § 106 (a)(4), the 1961 amendment to the Immigration and Naturalization Act of 1952, relates to judicial review of administrative orders of the Immigration Service but, with due deference, I cannot see how "It is hardly less clear" that § 242 (b)(4) of the Act, as the Court says, likewise applies exclusively to judicial review. Indeed, on the contrary, the latter section was

specifically enacted as the only standard of proof to be applied in deportation cases.

Before § 242 (b) was enacted the immigration laws contained no detailed provision concerning the burden of proof in deportation cases. *Kessler v. Strecker*, 307 U. S. 22, 34 (1939). In *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950), this Court extended the provisions of the Administrative Procedure Act to deportation proceedings. Congress immediately exempted such proceedings from the Administrative Procedure Act and in 1952 established in § 242 (b) an exclusive procedural system for deportation proceedings.

In essence that section, § 242 (b), provides for notice and a hearing before a "special inquiry officer" of the Immigration Service; sets the standard of proof in such cases as "reasonable, substantial and probative evidence"; and, authorizes the Attorney General to issue regulations. In issuing those regulations the Attorney General established a Board of Immigration Appeals. The Board's relationship to the orders of the special inquiry officer is similar to the relationship an agency has to the orders of a hearing examiner under the Administrative Procedure Act. The section also specifically provides that the regulations shall include requirements that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence" and that this standard shall be the "sole and exclusive procedure for determining the deportability of an alien under this section." This was the first time in our history that Congress had expressly placed a specific standard of proof on the Government in deportation cases. And the language Congress used made it clear that this standard related to the "burden of proof" as well as "the quality and nature of the evidence." The requirement of "reasonable" evidence cannot be meant merely to exclude "unreasonable" or "irrational" evidence but carries the

obvious connotation from history and tradition of sufficiency to sustain a conclusion by a preponderance of the evidence.¹ Congress in overruling *Wong Yang Sung, supra*, carved deportation proceedings from the judicial overtones of the Administrative Procedure Act and established a *built-in* administrative procedure.

This is made crystal clear by the reports of both Houses of Congress on § 242 (b). The Committee Reports, S. Rep. No. 1137, 82d Cong., 2d Sess., 28; H. R. Rep. No. 1365, 82d Cong., 2d Sess., 55-56, state in simple, understandable language that:

"The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below."

This Court consistently applied the standard of "reasonable, substantial and probative" evidence after the adoption of § 242 (b). *Rowoldt v. Perfetto*, 355 U. S. 115, 120-121 (1957).

The Court, however, in *Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955), once again extended the Administrative Procedure Act's provision respecting judicial review to deportation cases. The reaction of the Congress was identical to that of 1952 when it overruled *Wong Yang Sung, supra*. It enacted, in 1961, § 106 (a)(4) of the

¹ Thus the judicial review provision of the Administrative Procedure Act, 5 U. S. C. § 1009 (e)(5) limits the scope of review to a determination of support by "substantial evidence," and 5 U. S. C. § 1006 limits the agencies to acting on "reliable, probative, and substantial evidence." This pattern has traditionally been held satisfied when the agency decides on the preponderance of the evidence.

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Act. Just as § 242 (b) was the first statutory standard of proof, § 106 (a)(4) was the first express statutory standard of judicial review. It provided:

"the petition [for review] shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive."

Why Congress passed § 106 (a)(4) if judicial review, as the Court holds, was already exclusively covered by § 242 (b) is beyond my comprehension—unless it was engaged in shadow boxing. I cannot believe that it was.

The Court says that both the special inquiry officer and the Board of Immigration Appeals failed to state what the burden of proof was in these cases. Fault is found in the officer's use of the phrase "solidarity" of proof "far greater than required." This language was apparently taken from this Court's opinion in *Rowoldt*, *supra*, where the phrase "solidity of proof" was used. The findings of both the officers and the Board in these cases show specifically that the burden of proof followed in each case was that required of the Government in § 242 (b) and the Regulations of the Attorney General, *i. e.*, by "reasonable, substantial and probative evidence." This standard has been administratively followed by the Immigration Service in a long and unbroken line of cases. See *Matter of Peralta*, 10 I. & N. 43, 46.

The Court now extends the standard of *Schneiderman v. United States*, 320 U. S. 118 (1943), in denaturalization cases, *i. e.*, "clear, unequivocal and convincing evidence," to deportation cases. But denaturalization and expatriation are much more oppressive cases than deportation. They deprive one of citizenship which the United States had previously conferred. The *Schneider-*

man rule only follows the principle that vested rights can be canceled only upon clear, unequivocal, and convincing proof; it gives stability and finality to a most precious right—citizenship. An alien, however, does not enjoy citizenship but only a conditional privilege extended to him by the Congress as a matter of grace. Both petitioners, the record shows, knew this, yet they remained in this country for years—46 in the case of Sherman and 10 in that of Woodby. Still, neither made any effort to obtain citizenship.

II.

By treating these two cases as raising only a single issue the Court ignores some aspects of *Woodby* which greatly trouble me. Woodby sought review of the final deportation order against her more than six months after entry of that order. Section 106a (1) of the Act specifically limits the jurisdiction of the Court of Appeals to consideration of petitions for review "filed not later than six months from the date of the final deportation order." The legislative history of that provision makes it clear that Congress intended it to be strictly enforced in order to alleviate the spectacle of aliens subject to a deportation order and able to remain in this country for long periods of time by employing dilatory legal tactics. See H. R. Rep. No. 565, 87th Cong., 1st Sess. Since there is no time limit on petitions for rehearing or reconsideration, 8 CFR §§ 242.22, 103.5, permitting review of a final order of deportation merely because a timely petition for review of an administrative refusal to reopen the proceedings has been filed would negate the congressional purpose behind the insistence on timely filing in § 106a (1). *Lopez v. Immigration & Naturalization Service*, 356 F. 2d 986, cert. denied, — U. S. —.

² In *Giova v. Rosenberg*, 379 U. S. 118, this Court held only that denial of a petition to reopen or reconsider is reviewable. The Court

The Court holds only that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." (*Italics added.*) The ground alleged for deportation of Woodby was that she "had engaged in prostitution after entry." It has never been contended that this ground was not properly established. In fact it is conceded that Woodby engaged in prostitution. The only factual dispute involved in her case centers on the question whether her activities arose from duress and ended when the conditions compelling her to stray ceased to exist. It seems clear to me that since Woodby is raising duress as an affirmative defense she bears the burden of establishing all elements of that defense. See *In the Matter of M—*, 7 I. & N. 251. And the record clearly shows that both the administrative authorities and the Court of Appeals rejected Woodby's "bizarre" story. Under familiar principles those findings are binding on this Court, *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, and nothing in what the Court holds today affects that conclusion.

I regret that my powers of persuasion with my Brethren are not sufficient to prevent this encroachment upon the function of the Congress which will place an undue and unintended burden upon the Government in deportation cases. I dissent.

did not specify the scope of review to be applied. The Court may be depending upon a concession by the Government on this point, but it is clear that jurisdiction cannot be waived. *King Iron Bridge & Manf. Co. v. Otoo*, 120 U. S. 225; *Good Shot v. United States*, 179 U. S. 87.